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| PEOPLE OF THE STATE OF ILLINOIS, |) | |
| |) | |
| Plaintiff-Appellee, |) | Appeal from the Circuit |
| |) | |
| v. |) | Court of Cook County. |
| |) | |
| JOHN P. BRITTAIN, |) | Joseph A. Power, J. |
| |) | |
| Defendant-Appellant.) |) | |

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

In 1961, John Brittain, the defendant, was indicted for the offenses of rape, armed robbery and robbery. He pleaded guilty to five indictments and was sentenced to concurrent terms in the penitentiary for each offense, the longest being 10 to 50 years.

In 1962 he filed a pro se Section 72 petition which was dismissed after a hearing. In 1971 he filed a second petition which was also dismissed. An appeal was taken from this dismissal and the Public Defender was appointed to represent him.

The Public Defender has moved for leave to withdraw from the case. The motion, supported by a brief pursuant to Anders v. California, 386 U.S. 738 (1967), states that the defendant's 1971 petition was properly dismissed because it alleged no facts amounting to a deprivation of constitutional rights, was virtually a repetition of the 1962 petition from which there was no appeal, and was barred by the two-year limitation set forth in Section 72:

"(3) The petition must be filed not later than two years after the entry of the order, judgment, or decree...." Ill.Rev.Stat., 1969, ch. 110, para. 72."



Brittain was served with copies of the Public Defender's motion and brief. In addition, the administrative assistant of this court wrote to Brittain calling his attention to the motion and brief and giving him 60 days to file any points he might wish in support of the appeal.

We have received a letter from the defendant which asks us to notify him when this action is dismissed. He states that he has no objection because the Supreme Court issued a mandate remanding his case (Sup. Ct. #43783) to the Circuit Court of Cook County for a post-conviction hearing and that the point raised in the present appeal will be litigated in that hearing.

Accordingly, the petition of the Public Defender, concurred in by the defendant, will be allowed. The defendant's attorney is given leave to withdraw and the order appealed from is affirmed.

Affirmed.

McGlooin, P.J., and McNamara, J., concur.



55824

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| PEOPLE OF THE STATE OF ILLINOIS, |) | |
| |) | APPEAL FROM THE |
| Appellee, |) | CIRCUIT COURT |
| |) | OF COOK COUNTY. |
| vs. |) | |
| |) | HONORABLE |
| LLOYD CROSBY, (Impleaded), |) | SAUL EPTON, |
| |) | PRESIDING. |
| Appellant. |) | |

MR. JUSTICE LYONS delivered the opinion of the court:

Following a bench trial Lloyd Crosby was found guilty of the offense of unlawful possession of narcotic drugs (Ill. Rev.Stat. 1969, Ch.38, par.22-3). Judgment was entered on the finding and he was sentenced to a term of not less than two years nor more than two years and one day in the Illinois State Penitentiary.

The Public Defender of Cook County, appointed as appellate counsel, has filed a petition for leave to withdraw from the cause, asserting that an appeal would be frivolous. In accord with the mandate of *Anders v. California*, 1967, 386 U.S. 738, the petition is accompanied by a brief in which counsel has set out the single issue which in his opinion might arguably support an appeal; to wit, whether the trial court erred in denying defendant's motion to suppress physical evidence.

This court advised defendant of counsel's having filed a petition for leave to withdraw and allowed him time to file any points which he believed would support an appeal. No response has been received.

Prior to trial defendant challenged the admissibility, on Fourth Amendment grounds, of the physical evidence of the offense discovered on his person during the course of a search made incident to his arrest, alleging that the arrest could not be considered as a proper basis for the search since the arrest itself was not founded on probable cause. The only evidence bearing

on the question of probable cause introduced at the hearing on the motion to suppress consisted of the testimony of the arresting officers.

According to their testimony, they received a telephone tip from an informant who was known to them and who had previously supplied them with information which had proved to be accurate and led to arrests and convictions in other narcotics cases. The information related was that an individual known to the informant as Lloyd was selling narcotics in the vicinity of Madison and Leavitt Streets and that another individual, known to the informant as Lawrence accompanied Lloyd and had in his possession a number of "outfits," hypodermic needles and syringes. The informant also stated that he and others had purchased narcotics from the man known as Lloyd fifteen minutes previously at the mentioned location and that the informant had seen Lloyd removing tin foil packets from a plastic bag.

The officers arranged to meet the informer and drove him to the area in question. The informant pointed out two individuals standing together, the defendant and one Lawrence Norwood. The officers drove past these individuals for a short distance and allowed the informant to exit their vehicle. They then returned and effected the arrest of defendant and Norwood. A search of defendant's person revealed a plastic bag suspended from the waistband of his trousers which contained 25 tin foil packets, each of which contained a quantity of heroin. A number of hypodermic needles and syringes were found in Norwood's possession.

In our view the totality of the information supplied by the informant, including the factual basis for his accusation, when considered in light of his previously established record of reliability and accuracy was sufficient to establish probable cause for defendant's arrest, and that the court's refusal to

require disclosure of the identity of the informant was proper.
McCray v. Illinois, 1967, 386 U.S.300.

Our independent review of the entire record in this cause has revealed no arguable basis for an appeal, thus confirming to our satisfaction counsel's conclusion that an appeal would be frivolous. Accordingly, the petition for leave to withdraw is allowed and the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG, P.J. and BURKE, J., concur.





8 I.A.³ 14
Oct 11/72

57299

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| PEOPLE OF THE STATE OF ILLINOIS, |) | |
| |) | |
| Plaintiff-Appellee, |) | APPEAL FROM THE |
| |) | |
| vs. |) | CIRCUIT COURT OF |
| |) | |
| HAROLD BURRELL, |) | COOK COUNTY. |
| |) | |
| Defendant-Appellant. |) | Hon. Richard J. Fitzgerald, |
| |) | Presiding. |

MR. JUSTICE ADESKO delivered the opinion of the court:

Defendant, Harold Burrell, was charged with two separate acts of grand theft. After pleading guilty to each offense, defendant was admitted to five years probation on each charge. It was a condition of that probation that defendant would not violate any criminal law of the State of Illinois. After defendant was subsequently convicted of attempted theft from an auto, and after he failed to report to his probation officer, a rule to show cause why his probation should not be terminated was issued. On December 16, 1971, a hearing on the rule was held. The trial court concluded that defendant had violated his probation and that the probation should be terminated. The trial judge sentenced defendant to serve not less than three, nor more than nine years in the Illinois State Penitentiary for each of the two grand theft convictions, the sentences to run concurrently.

Defendant, represented by the Public Defender filed a notice of appeal. The Public Defender now seeks to withdraw and filed a brief in support of his motion, pursuant to Anders v. California, 386 U.S. 738, 18 L. Ed. 493, 87 S.Ct. 1396, and states that from a review of the record the only basis for an appeal would be whether defendant was denied procedural due process of law in his probation hearing. The Public Defender concludes that the trial court adhered to the applicable law and that it did not abuse its discretion in revoking defendant's probation.

Defendant received a copy of the Public Defender's motion to withdraw and a copy of the supporting brief. He was also sent a letter by this court notifying him of the motion and giving him an opportunity to file any points he might choose to support his appeal. Defendant failed to respond.

Our examination of the record in the instant case discloses that defendant was properly informed of the facts of the probation violation; was present in court represented by counsel, when evidence of a conviction in contravention of the terms of his probation was introduced; and had ample opportunity to defend against and refute the alleged violations which he failed to do.

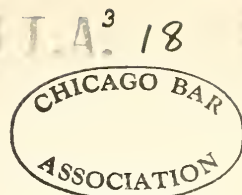
After examining the point raised by the Public Defender's brief, as well as the entire record before this court, we are compelled to conclude that this appeal would be wholly frivolous and without merit. The motion of the Public Defender to withdraw from the instant appeal is therefore allowed and the judgment of the Circuit Court of Cook County is hereby affirmed.

Affirmed.

Dieringer, P.J., and Burman, J., concur.

(Abstract Only)

No. 54556



JOHNNIE H. HUNT,

Plaintiff-Appellant,

vs.

CIVIL SERVICE COMMISSION OF THE
CITY OF CHICAGO, and C. WILLIAM
RUDELL, Superintendent, HOUSE
OF CORRECTION OF THE CITY OF
CHICAGO,

Defendants-Appellees.

)
)
) APPEAL FROM THE
) CIRCUIT COURT OF
) COOK COUNTY.
)

)
) HONORABLE
) EDWARD J. EGAN,
) PRESIDING.
)
)

MR. PRESIDING JUSTICE MCGLOON delivered the opinion of the court:

Plaintiff brings this appeal under the Administrative Review Act from an order of the Circuit Court affirming the findings and order of discharge of the Civil Service Commission of Chicago. The plaintiff, a correctional officer at the House of Correction, was charged with Conduct Unbecoming an Employee of the City of Chicago and Willful Maltreatment of a Prisoner in that he did strike and beat one Willie Brown, an inmate, with a blackjack, both charges arising from an altercation between the plaintiff and an inmate of the House of Correction that occurred on May 18, 1967. A full hearing on the charges was held before the Commission which found that plaintiff was guilty of striking and beating inmate Brown and ordered his discharge from employment. Plaintiff sued for administrative review in the Circuit Court which affirmed the Commission's findings and decision. Plaintiff now appeals from that order and argues that he was not guilty of Willful Maltreatment of a Prisoner, because he was properly exercising his right to self-defense and that the Commission's findings are not supported by substantial evidence and are against the manifest weight of the evidence. The defendants answer that the findings were supported by substantial, although conflicting, evidence.

We affirm.

The relevant evidence adduced at the Commission hearing is as follows: The City presented three witnesses, all correctional officers, who described the incident between plaintiff and inmate

Brown. None of the three could describe how the fight started or who struck the first blow. Witness Juras, a Captain of Security and plaintiff's immediate superior, testified that he told the plaintiff to "let it go this time" just before the affray began. Witnesses Juras and Jones testified that the plaintiff had a "blackjack" in his hand during the fight, and witness Kramer saw the plaintiff pull a "slap-stick" from his pocket. Witness Juras got a glimpse of plaintiff striking inmate Brown with the "object." Juras also contradicts plaintiff's testimony in that he testified that inmate Brown was not holding a food tray immediately before the affray began.

Witness Jones saw a "couple" of blows struck by plaintiff upon inmate Brown with some "object." Jones also testified that plaintiff struck inmate Brown a second time after he went between them to stop the fight. "Brown got up and was struck again with the object," and " * * * that is when all these inmates came that way. After the man was hit a second time."

In response plaintiff called five witnesses. Witness Wells, an Assistant Superintendent at the House of Correction, testified to the many bad conduct reports that had been issued against inmate Brown and concluded that he was generally an insubordinate, intransigent and pugnacious character. Witnesses Dudek, Churchill and Weinscheimer, all correctional officers, testified to plaintiff's good character and his good reputation for truth and veracity.

Plaintiff's testimony contradicts the testimony of earlier witnesses in some essential details. He testified that inmate Brown had been insubordinate earlier in the day and later began the fight by striking plaintiff with a food tray. Plaintiff stated that Brown tried to attack him with a large cell house key, and in order to defend himself he struck Brown with his fists and at one point picked up a piece of hose. Plaintiff admitted striking Brown two or three times with his hands but denied striking Brown after Officer Jones arrived.

Plaintiff contends that the Commission's findings were not supported by substantial evidence, and were against the manifest weight of the evidence. He further argues that the evidence indicated only that he was exercising his right to act in self-defense.

The scope of review upon appeal from administrative decisions has been clearly defined in this state. In Schwarze v. Board of Fire and Police Commissioners (1964), 46 Ill. App. 2d 64, 196 N.E. 2d 724, the Court said:

While the courts will review all questions of fact presented by the record a court is not privileged to substitute its judgment for that of the administrative agency if there is sufficient evidence in the record to support the agency's findings. Lorenson v. County Board of School Trustees of Piatt County, 13 Ill. App. 2d 468, 142 N.E. 2d 493; Jefferson Ice Co. v. Industrial Commission, 404 Ill. 290, 88 N.E. 2d 837. The argument that the reviewing court, if it heard the case originally, might have reached a different conclusion from the same evidence is irrelevant. Zinser v. Board of Fire and Police Commissioners of City of Belleville, 28 Ill. App. 2d 435, 172 N.E. 2d 33.

An appellate court, on review of administrative proceedings should not disturb the findings of fact of the administrative body unless these are manifestly against the weight of the evidence. This requires that an opposite conclusion be clearly evident. Rude v. Seibert, 22 Ill. App. 2d 477, 483, 161 N.E. 2d 39. Evidence in cases is often conflicting and the mere fact that an administrative agency rules on evidence which is conflicting cannot be made the grounds for reversal by a reviewing court. The review of the transcript must disclose a clear lack of substantial evidence. (46 Ill. App. 2d at 67.)

While the original charge against the plaintiff before the Commission alleged that he had struck and beat the inmate with a blackjack, the decision made no mention of a weapon, but found that the plaintiff had struck and beat the inmate Brown. An examination of the record discloses ample evidence to support that finding of the Commission. The record also supports the finding that plaintiff was not acting in self-defense. Sergeant Jones testified that after he had separated the two men and Brown had been knocked to the floor by plaintiff, Brown arose and was again struck by plaintiff.

Cases cited by plaintiff in support of his argument that

he acted in self-defense are distinguishable from the instant case. People v. Lees (1965), 60 Ill. App. 2d 254, 208 N.E. 2d 656, is a criminal case in which two police officers were charged with battery upon a citizen they were attempting to arrest. In considering whether the defendants used excessive force to effectuate the arrest the Court said it was important to determine who was the aggressor in the affray. The plaintiff suggests that the holding in that criminal case is authority for the instant case, but it is obvious that the Court in Lees was reviewing the evidence in that case against a standard of guilt (i.e., beyond a reasonable doubt) that is of a higher degree than that required upon a review of administrative findings. In Lee v. Police Board of Chicago (1966), 72 Ill. App. 2d 134, 218 N.E. 2d 783, the Court points out this distinction between the standard of proof in criminal cases and the lesser standard required in administrative review cases.

A review of the evidence in this case discloses conflicting accounts of the affray that admittedly occurred. The record discloses substantial evidence to support the Commission's findings and decision. The opposite conclusion is not clearly evident, and we affirm the judgment of the Circuit Court upholding the decision of the Commission.

Judgment affirmed.

DEMPSEY and McNAMARA, JJ., concur.

81A³ 25

No. 55553

| | | |
|----------------------|---|-------------------|
| JAYNE BLOWITZ, |) | APPEAL FROM THE |
| |) | CIRCUIT COURT OF |
| Plaintiff-Appellee, |) | COOK COUNTY. |
| |) | |
| vs. |) | |
| |) | |
| MILROY R. BLOWITZ, |) | HONORABLE |
| |) | IRVING LANDESMAN, |
| Defendant-Appellant. |) | PRESIDING. |

MR. PRESIDING JUSTICE MCGLOON delivered the opinion of the court:

This is a post-divorce decree proceeding. The action was initiated by Petition filed by defendant seeking the termination, suspension or modification of the alimony heretofore awarded to plaintiff. After a hearing before the trial judge, the alimony award was reduced from \$6000 per annum to \$385 per month, a reduction of \$115 a month. Defendant pursues this appeal for a further reduction or suspension of the alimony award arguing that the trial judge abused his discretion in failing to suspend alimony where no need for its continuance was established.

We reverse and remand.

The plaintiff and defendant were divorced on March 29, 1960. The decree and Memorandum of Agreement awarded custody of the parties' minor child to defendant and provided for permanent alimony payments to plaintiff by the defendant in the sum of \$6000 per annum.

On August 29, 1970, defendant filed a Petition for suspension of alimony, and at the proceedings in the trial court the following pertinent evidence was adduced. At the time of the divorce, plaintiff resided in a 12-room house in Evanston and after the divorce relocated to an apartment in Chicago. Plaintiff was not employed prior to the divorce, but since 1965 has been regularly employed. Plaintiff's gross income from employment for the years since 1965 has increased steadily; for 1966 it was \$5895; for 1967 it was \$7031; for 1968 it was \$8228; and for 1969 her gross income, exclusive of alimony or other non-employment income, was \$8036. Plaintiff testified she owned no stocks, bonds or securities of any kind and had a savings account with a balance

of \$7000; this amount is largely the lump sum award of past due alimony payments.

The order of the trial court, reciting its findings and noting the estimated cost of living increase since 1960, reduced the order of alimony \$115 a month to \$385 per month.

Defendant raises the issue of whether the trial judge abused his discretion in estimating that due to a 5 per cent per annum rise in the cost of living from 1960 to 1970 the plaintiff would require \$9000 to maintain herself for the year 1970. The defendant argues that without any specific evidence adduced during the proceedings as to the actual annual percentage increase in the cost of living, there was an abuse of discretion when the trial judge set the sum of \$9000 as that needed by the plaintiff to maintain herself.

A court, without request of a party, can take judicial notice of such propositions of general knowledge as are so universally known that they cannot reasonably be the subject of dispute, such as periods of inflation and deflation. Lahman v. Gould (1967), 82 Ill. App. 2d 220, 226 N.E. 2d 443; Peoples Gas Light and Coke Co. v. Slattery (1940), 373 Ill. 31, 25 N.E. 2d 482. But it is also clear, we find, that a court can take judicial notice of specific facts of generalized knowledge (i.e., the annual percentage increase in the cost of living) only when that specific fact is capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy and the judge is furnished with the source of indisputable accuracy. In the instant case, although the plaintiff was clearly entitled to alimony, there was no source of indisputable accuracy in the record that would enable the judge to determine the annual increase in the cost of living. For this reason we reverse and remand for a hearing to properly determine the percentage increase in the cost of living since the date of the entry of the divorce decree and to allow the trial court to modify its order increasing or decreasing the amount awarded according to that finding.

A further word is necessary in order to properly dispose of this appeal. The defendant also argues that the trial court abused its discretion in failing to suspend or further reduce the award of alimony in light of the fact that plaintiff's income from employment is now more than the amount of the original award of alimony.

The award of alimony or modification thereof can be affected by a change in the circumstances of the parties after the decree is entered. "As the measure of the sum required is necessarily the need of the wife and the ability of the husband to pay, the amount decreed will logically be affected by a change in either element." Herrick v. Herrick (1925), 319 Ill. 146, 149 N.E. 820. But the income earned by the divorced spouse is not the only factor that is used to determine her need. It is also a familiar rule that a divorced husband is obligated to maintain his ex-wife in the standard of living to which he had accustomed her. Arnold v. Arnold (1947), 332 Ill. App. 586, 76 N.E. 2d 335. The test for determining the proper amount of alimony has been set forth in Byerly v. Byerly (1936), 363 Ill. 517 at 525, 2 N.E. 2d 898:

There is no hard and fast rule for the fixing of alimony. Matters which are usually considered by the court in determining alimony are the ages of the parties, their condition of health, the property and income of the husband, separate property and income, if any, of the wife, the station in life of the parties as they have heretofore lived,*** If the circumstances of the parties change, upon proper showing the court may increase or decrease the amount of alimony as conditions may warrant.

See also Warren v. Warren (1963), 40 Ill. App. 2d 286, 189 N.E. 2d 401.

This is not a case where defendant was denied any reduction in the alimony he was required to pay. The trial court did not abuse its discretion by failing to further reduce or suspend the alimony because plaintiff's present gross income is more than the original alimony award. Hoover v. Hoover (1940), 307 Ill. App. 590, 30 N.E. 2d 940.

Accordingly, the order of the Circuit Court is reversed and this cause is remanded for further proceedings not inconsistent with this opinion.

Judgment reversed and remanded.

DEMPSEY and McNAMARA, JJ., concur.

8 I.A³ 26

(24540—477—9-70) 160-0



STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 25th day
of October A. D. 1972, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

General No. 11373

Agenda No. 72-158

STATE OF ILLINOIS
IN THE APPELLATE COURT
FOURTH DISTRICT

| | | |
|----------------------------------|---|---------------|
| PEOPLE OF THE STATE OF ILLINOIS, |) | |
| Plaintiff-Appellee, |) | |
| vs |) | Appeal from |
| EUGENE EARL FRED, |) | Circuit Court |
| Defendant-Appellant. |) | Adams County |

MR. JUSTICE SIMKINS delivered the Opinion of the Court.

The Defendant-Appellant, Eugene Earl Fred, was convicted on a plea of guilty of the crime of armed robbery. The prosecution was initiated by a filing of an information filed September 24, 1971, which alleged that the offense was committed on September 21, 1971.

The defendant waived indictment and entered a plea of guilty to the charge on September 29, 1971, and was sentenced on October 8, 1971. He was given sentence credit of fifteen days for the period September 24, 1971, to October 8, 1971. We note that we have pending in this Court a direct appeal involving this armed robbery offense, which appeal bears our General No. 11724.

No. 54995

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
vs.)
)
JOHN BUTCHER,)
)
Defendant-Appellant.)
)

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY.

HONORABLE
L. SHELDON BROWN,
PRESIDING.

MR. PRESIDING JUSTICE MCGLOON delivered the opinion of the court:

This is an appeal from a jury verdict finding defendant guilty of the offenses of deviate sexual assault (Ill. Rev. Stat. 1969, ch. 38, par. 11-3), indecent liberties with a child (Ill. Rev. Stat. 1969, ch. 38, par. 11-4), and aggravated kidnapping (Ill. Rev. Stat. 1969, ch. 38, par. 10-2).

For these offenses, defendant was sentenced to the following terms in the Illinois State Penitentiary, all sentences to run concurrently: aggravated kidnapping, 40 to 80 years; indecent liberties with a child, 7 to 14 years; deviate sexual assault, 7 to 14 years. Defendant argues before this Court that dual penalties for deviate sexual assault and indecent liberties with a child are improper in that both offenses arise out of the same criminal conduct; that imposition of a 40 to 80 year sentence for aggravated kidnapping was excessive; that the State did not prove him guilty beyond a reasonable doubt of the crimes charged; and that confinement or movement of a person incidental to the commission of another offense on that person does not constitute aggravated kidnapping.

We affirm.

Because of the issues raised in this appeal, some discussion of the key testimony adduced at trial is in order.

Adeline Nettnin, the mother of Guy Nettnin, the complainant, was called by the State and testified as follows: On September 25, 1966, at about 9:00 p.m. Guy and Scott, Guy's younger brother, left the family residence to go to Reamer's Drug Store some four blocks away. At that time Guy was 14 years old, and his brother Scott was nine. Scott returned home alone at 9:45 p.m. and after conversing with him, Adeline went to the Town Hall Police Station

and filled out a missing persons report. Officer Young arrived at their home at 11:30 p.m., and Guy returned at 11:50 p.m. His hair was disheveled, he had a blood mark under his nose, and also had a "bunch of redish brown * * * hickies" on his neck. Guy proceeded immediately to the bathroom where he gagged and threw up.

Guy Nettnin, the complaining witness, testified on behalf of the State as follows: At about 9:15 p.m. on September 25, 1966, he and his brother Scott went to Reamer's Drug Store on an errand. As they were walking across the street after exiting the drug store, a man sitting in a brown car called them over. He identified that man as the defendant. Defendant asked the boys their names and ages. Defendant told the boys that he was "out * * * for curfew." He then told Scott to go home. After Scott left, defendant ordered Guy into the car to be taken home. When Guy refused, defendant brandished a silver pistol, said, "I'm a police officer, I'm taking you home," and forced Guy into his car. The pistol was introduced into evidence. Defendant began driving but not toward the boy's home. Guy was forced to ride with his head down on the seat. They arrived at Merriwell Street where defendant told Guy that he "wanted [him] for sex." Guy was forced to undress and defendant played with his penis. Defendant forced Guy to put his mouth on defendant's penis, and defendant put his mouth on Guy's penis. Guy was then told to dress. Guy and the police returned to that same spot later that night, a factory parking lot near Lakewood and Merriwell Streets.

After leaving the parking lot defendant drove to a gas station at Racine and Belmont. Guy had his head down on the seat. The defendant leaned down and kissed him telling him that he loved him and that he would buy Guy anything he wanted. Defendant brought Guy into the station, the door to which he opened with a key. Guy tried to escape at that time but was apprehended by defendant and struck in the mouth and nose by defendant three times. Defendant took Guy to a storage room of the garage where Guy again was made to undress. Defendant undressed and lay down on top of him. Defendant put his finger in Guy's rectum, then sucked Guy's penis. Afterward,

Guy was instructed to dress, but he left his socks and T-shirt in the storeroom. Defendant then drove Guy home, and offered to see him again.

When Guy arrived in his house he ran up to the bathroom and began washing and gargling. He then accompanied Officer Young and another officer, who were already at the house when he arrived, to the White House Tavern which was directly across from Reamer's Drug Store. Upon entering, Guy saw defendant standing by a booth and identified him for the officers. By this time defendant was attempting to walk out, and an officer pursued him. Defendant was apprehended by the officers. The brown car was parked across the street.

Later that night, the officer, Guy and defendant went to the Sinclair Gas Station where Guy had been assaulted. Using a key obtained from defendant, the officers entered and found Guy's socks and T-shirt where he had left them.

Scott Nettnin, Guy's younger brother, testified on behalf of the State as follows: He identified defendant as the man who called the two boys over to his car and questioned them about curfew. Thereafter, defendant told Scott to go home which he did.

Officer James Young was called as a witness for the State and testified as follows: He went to the Nettnin household on the evening of September 25, 1966, to investigate a missing person report. While he was there the missing person, Guy Nettnin, returned and ran into the bathroom. Thereafter, Young, Guy, and Officer O'Boyle proceeded to the White House Tavern. Officer Young proceeded to the rear of the tavern when he heard Officer O'Boyle yell, "He just ran out the door." Young pursued and, after a time, captured a man identified by the complainant as the man who assaulted him. That man was identified by Officer Young as defendant.

Charles Guenter, a witness for the State testified that he ran a Sinclair gas station on Belmont and Racine on September 25, 1966, and that John Butcher was an assistant. John Butcher had a key to the station. Furthermore, Guenter testified that the pistol

introduced into evidence was similar to a pistol which was missing from one of his other businesses where Butcher had been on occasion.

Officer O'Boyle testified on behalf of the State as follows: He was the patrol sergeant on duty September 25, 1966, and was summoned to assist Officer Young in the matter of a missing person. When he arrived on the scene, Officer Young and Guy Nettnin were in front of the house. The three proceeded to the White House Tavern. After entering, the boy whispered to them, "There's the man." The man indicated by the boy is the defendant. The defendant then walked from a point 2 feet from a booth and toward the door. Officer Young gave chase and brought defendant back to the tavern. A brown car, identified by Guy as the car into which he was forced earlier, was found across the street. The defendant admitted that it was his car. After bringing the defendant to the police station, he returned to the tavern and found the pistol introduced into evidence on the seat of the booth near where the defendant was first spotted. O'Boyle then proceeded to the Sinclair station with Guy. Using a key from the ring taken from defendant, access was gained to the station. O'Boyle followed Guy to a small storage room located in the station. A boy's T-shirt and a pair of black socks were recovered therein.

Betty Gall testified on behalf of the defendant that she was a friend and knew that his reputation in connection with indecent acts with children was good. Furthermore, she had nine children and allowed defendant to babysit for her.

Lea V. Cox testified on behalf of the defendant that he had known John Butcher for five years and that he saw Butcher at his apartment September 25, 1966, when he arrived home at 5:30 p.m. or 6:00 p.m. and that defendant remained at his apartment until 10:30 p.m. or 10:45 p.m.

John Butcher testified in his own behalf as follows: He was 44 years old and had spent 28 of those 44 years in prison. On September 25, 1966, he was at the apartment of Lea V. Cox from 6:15 p.m. until 10:30 p.m. or 11:45 p.m. that evening. He denied

being in his automobile that night, having seen Scott or Guy Nettin that evening, or having assaulted Guy Nettin in any manner. When O'Boyle entered the White House Tavern later that evening, defendant said, "Hi, Sarge" and walked out. However, he got nervous and ran because he was an exconvict. He had no weapon with him that evening.

We will first consider defendant's argument that he was not proven guilty beyond a reasonable doubt of the offenses charged. Defendant alleges in support of this argument that his alibi testimony is in conflict with the State's case. It is a fundamental principle of law, often reiterated by this Court, that all conflicts in evidence are to be resolved by the trier of fact (People v. Staten (1970), 266 N.E. 2d 391), and that the jury's verdict will not be disturbed unless it is clearly contrary to the weight of the evidence or is so unsatisfactory as to cause reasonable doubt of the defendant's guilt. People v. Sulton (1970), 266 N.E. 2d 351. The question of credibility appears to have been decided in favor of the State's witnesses, and a careful examination of the record discloses the jury's verdict to be neither against the weight of the evidence nor based upon evidence so unsatisfactory as to raise a reasonable doubt of defendant's guilt.

Defendant next alleges that it was improper for the court to sentence him for the offenses of indecent liberties with a child and deviate sexual assault, since both offenses arise from the same conduct.

Were we to assume, as does defendant, that the incident in the factory parking lot and the incident in the gas station were both acts contributing to only one course of conduct, we might find merit in his argument. However, the record does not support such an assumption. It is clear from the testimony adduced at trial that these two acts were sufficiently separated in time, place and character to support different charges of criminal conduct.

While in the factory parking lot, defendant forced an act of oral intercourse upon his victim. This is conduct proscribed as deviate sexual assault. While in the gas station, defendant laid

upon his victim and lewdly fondled him. This is conduct proscribed as indecent liberties and was distinct in time, place and nature from the conduct of defendant in the parking lot. Both sentences must, therefore, be affirmed. See People v. Johnson (1970), 44 Ill. 2d 463, 256 N.E. 2d 343.

Defendant next argues that mere confinement or movement of a person incidental to the commission of another offense on him does not support a charge of aggravated kidnapping. Our Supreme Court rejected this argument in the recent case of People v. Canale (1972), 52 Ill. 2d 107, ___ N.E. 2d ___, wherein it held:

Evidence that the prosecutrix was driven some distance from her home and confined for a period of 45 minutes during which she was raped supports the conviction for aggravated kidnapping.

In the case before us, the victim was under the control of the defendant for approximately two hours, during which time he was driven about at gun-point, brought in and out of a gas station, and forced to perform unnatural acts. Surely these facts are more than adequate to place this case under the rule enunciated in Canale.

Finally, defendant argues that a sentence of 40 to 80 years for aggravated kidnapping under the facts of the case is excessive. Aggravated kidnapping carries with it an indeterminate term with a minimum of not less than two years in the penitentiary. Thus, the sentence in issue was within the limitations prescribed by the legislature, and should not be disturbed unless it is greatly at variance with the purpose and spirit of the law or manifestly in excess of the proscriptions of Section 11 of Article II of the Illinois Constitution (1870), Section 11 of Article I of the Constitution of the State of Illinois (1970). People v. Hampton (1969), 44 Ill. 2d 41, 253 N.E. 2d 385. The fact that defendant had spent 28 of his 44 years in prison, coupled with the trial court's superior opportunity to observe the defendant's demeanor and attitude throughout the course of his trial would indicate that the trial court's imposition of the 40 to 80 year sentence was neither arbitrary nor in derogation of constitutional standards.

Judgment affirmed.

DEMPSEY and McNAMARA, JJ., concur.

On February 3, 1972, the Circuit Court of Adams County acting on "....defendant's amended petition for sentence credit...." reaffirmed its original allowance of sentence credit on this offense. The defendant then filed a pro se notice of appeal. The only issue raised is the trial court's refusal to allow twenty-six days credit for jail time. The defendant does not suggest why he should be given credit on an offense committed in September of 1971 for time spent in the county jail of Adams County in June and July of that year. We do note that the defendant has another appeal pending in this Court under the General No. 11723, which involves an offense committed in June, 1971 in Adams County, and that he was incarcerated on the June offense because of failure to make bail. In any event, the "amended petition for sentence credit" involves an administrative act of the trial court. The defendant does not contend nor does the record before us reveal any issue of constitutional dimension. The reaffirmance of the sentence credit to which defendant was entitled was, in effect, a method of furnishing information to institutional authorities, and the Court's action in this connection was not an appealable order. The appeal is, accordingly, dismissed.

Appeal dismissed.

Craven,PJ. and Smith, J. concur.

8 I.A.³ 41

72-60

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
October 26, 1972 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

Abstract

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED

OCT 26 1972

HOWARD K. KELLEY, Clerk
Appellate Court, 2d District

| | | |
|---------------------------------|---|----------------------|
| PEOPLE OF THE STATE OF ILLINOIS |) | |
| |) | |
| Plaintiff-Appellee |) | Appeal from the 18th |
| |) | Judicial Circuit, |
| -vs- |) | Du Page County |
| |) | |
| WILLIAM J. STURGEON JR. |) | Hon. Jack T. Parish |
| |) | Judge presiding |
| Defendant-Appellant |) | |

MR. JUSTICE GUILD delivered the opinion of the court.

Defendant was convicted in a bench trial of driving an automobile with his driver's license revoked. He was sentenced to 30 days in the county jail and fined \$100.

Defendant was observed by a State trooper going through a toll booth in which he screeched his tires and drove in a weaving manner. The case before us is on an agreed statement of facts. It was agreed that the State trooper "recognized the Defendant and recalled that the defendant's driver's license had been suspended a few weeks previously." The trooper radioed two other state patrol cars and the officers arrested the defendant. It was later disclosed he did not have a valid driver's license. The sole issue raised by the defendant in this appeal is that the court should have granted his motion to suppress "certain evidence." From an examination of the record this court is unable to determine definitely what the defendant sought to suppress. It is therefore difficult for an adjudication of that issue by this court.

Defendant contends that there was no probable cause for his arrest. He therefore moved to suppress "all confessions, statements, admissions, whether inculpatory or exculpatory, and whether written or oral, made by the defendant prior to, at the

time of, or subsequent to his arrest." We find no such "admissions, statements or admissions" in the record.

As to "probable cause" for the arrest of the defendant, attention is directed to the recent case of this court, People v. Francis (1972), 4 Ill.App.^{3d} 65, 280 N.E.2d 49. In that case, in quoting with approval Mincy v. District of Columbia (D.C. App.1966) 218 A.2d 507, we stated that a routine spot check of a motorist to ascertain whether he has a valid driver's license is proper, provided such check is not used as a substitute to uncover a crime not related to possession of a driver's license. The case before us is even stronger. The defendant was specifically stopped for a check of his driver's license only. The police not only had the right to stop defendant driving his vehicle to ascertain whether he had a valid driver's license, but even more so, where as stipulated herein, one of the officers recognized defendant as having had his driver's license recently suspended. We therefore find that defendant's motion to suppress was properly denied.

The record herein discloses no aggravating circumstances. We therefore consider this a first offense and feel that under the facts of this case that the ends of justice would be well served by reducing the confinement herein to the minimum sentence of seven days provided for in Ill.Rev.Stat. 1969, ch. 95 $\frac{1}{2}$ sec. 6-303.

JUDGMENT AFFIRMED AS MODIFIED.

P.J.SEIDENFELD and J. ABRAHAMSON Concur.

71-378/9 Cons.

UNITED STATES OF AMERICA

17 8 I.A.³ 47

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

October 27, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

NO. 71-378 (Cons.
NO. 71-379 (

Abstract

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED

OCT 27 1971

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
vs.)
)
RAMIRO WATTS,)
)
Defendant-Appellant.)

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

Appeal from the Circuit
Court of the 18th Judicial
Circuit, DuPage County,
Illinois.

Mr. JUSTICE ABRAHAMSON delivered the opinion of the court:

Defendant was found guilty in a jury trial of theft and of aggravated battery of a peace officer. The trial judge imposed a sentence of two to six years for theft and six months for aggravated battery, to be served concurrently.

On February 10, 1971, at about 11:50 p.m. defendant was apprehended after a chase by police following a report of a stolen vehicle. A 1970 white Saab automobile, owned by Richard Bender, was stolen from its location in front of the house of Mr. Bender's girl friend. Mr. Bender saw his car being driven away and gave chase on foot, calling to his girl friend to report the theft to the police. Mr. Bender then stopped a passing motorist, got into the automobile, and continued the pursuit without losing sight of the Saab. The police joined the chase, riding ahead of them. Finally, the Saab automobile pulled into a driveway with the police car about ten feet behind. Defendant alighted from the car and was told by the police that he was under arrest for stealing a car. He told the police that he had not stolen the car, but was a hitchhiker and was picked up by a stranger driving the car, who had run behind a building before the officers had driven up. The defendant resisted being handcuffed by the police,

but was finally subdued. He was taken to the police station and told to strip in the bathroom. Upon defendant's refusal to do so, he was wrestled to the floor by two officers, one of whom started to remove defendant's clothing. As the defendant got to his feet, he struck one of the officers two blows which caused a swelling on his face.

In this appeal defendant argues that the Court erred in giving, over his objection, instruction 20 which stated:

"A person is not authorized to use force to resist an arrest which he knows is being made by a peace officer even if he believes that the arrest is unlawful and the arrest in fact is unlawful."

Defendant relies on our decision in People v. McCauley, 2 Ill. App. 3d 734, in which we considered an identical instruction, and there held that, since that defendant was not charged with resisting arrest, it was "prejudice to the defendant" and reversible error to inject into the case an instruction based upon the other crime.

However, in the McCauley case the only crime with which the defendant was charged was aggravated battery, and there was contradictory testimony with respect to occurrences en route to the police station; and the defendant was already under arrest when the alleged resisting occurred. Moreover, the trial court, in addition to the erroneous instruction dealing with resisting arrest, gave one dealing with attempted escape; defendant was charged with neither of these crimes. There we held that those two erroneous instructions prejudiced the defendant because they injected irrelevant issues into the jury's deliberations.

The McCauley case is not apposite here. In this case defendant was charged with two separate crimes, i. e. , (1) theft of an automobile, and (2) aggravated battery. (It may be noted in passing that defendant made ^{no} motion for severance.) The

evidence as to defendant's guilt is clear and convincing.¹ The offense of resisting arrest was part of the same set of facts involved in the theft and aggravated battery, even though defendant was not charged with it.

The evidence of defendant's guilt of the two crimes with which he was charged was so overwhelming that even though instruction 20 was erroneous, it was "harmless beyond a reasonable doubt" within the meaning of Chapman v. California (1967), 386 U.S. 18, 24, 17 L.Ed.2d 705, 87 S.Ct. 824, and there was no prejudice to this defendant resulting from that instruction. Under the facts of this case the jurors could not possibly have brought in a not guilty verdict even if the erroneous instruction referring to resisting arrest had not been given.

In People v. Bracey, 51 Ill.2d 514, 518, 520, the Illinois Supreme Court discussed at length the harmless error doctrine pronounced in Chapman and held that under the facts in that case the testimony complained of, even if perjured, was harmless beyond a reasonable doubt. (See also, People v. Taylor, 32 Ill.2d 165, 170.) Likewise, in this case the instruction complained of was "harmless beyond a reasonable doubt."

1 Defendant's statement that he was a hitchhiker who had been picked up in the stolen car by a stranger who suddenly disappeared when the vehicle was stopped by the police was not corroborated; on the contrary, the evidence shows that the automobile was in view of its owner, the driver of another car who picked up the owner to give chase, and by the police during the entire period (approximately ten minutes) from the moment it was stolen until it was brought to a stop. No other person was seen getting out of the car other than the defendant.

The defendant next argues that the sentence of two to six years is excessive because the pre-sentence report on his background included his prior conviction for possession of marijuana, a misdemeanor, which was, in effect, voided by the decision of the Illinois Supreme Court in People v. McCabe, 49 Ill.2d 338. Thus we are asked here to extend the McCabe decision so as to invalidate a sentence imposed by the trial court merely because the pre-sentence report listed that conviction. This we decline to do. The void conviction, of course, was not the only item in defendant's prior record. That record included (besides the conviction and sentence for possession of marijuana): A conviction in June 1970 for "theft, no valid driver's license--fine \$80--credit for good time"; and a conviction in January 1971 for "battery--8 days in county jail". It should be noted that the latter conviction occurred only some two weeks before he was arrested in this case. In addition the pre-sentence report included many other statements as to defendant's background which need not be set forth at length here.

In U. S. v. Tucker, ___ U.S. ___, 30 L.Ed.2d 592, 92 S.Ct. 589, on which defendant relies, the trial court gave explicit attention to defendant's three previous felony convictions (two of which were later determined to be "constitutionally invalid"), and imposed the maximum term. In this case there is nothing in the record to indicate that the trial court gave any attention to defendant's background in arriving at the sentence imposed.

This court in People v. Buell, 120 Ill.App.2d 367, 372, cited many authorities, including People v. Taylor, 33 Ill.2d 417, 424, in support of this statement of the law:

"When a sentence is imposed within the limits prescribed by statute, an appellate court will not disturb that sentence unless it clearly appears that the penalty imposed constitutes a great departure from the fundamental law and its spirit and purpose, or that it is manifestly in excess of the proscription of Section 11 of Article II of the Illinois Constitution requiring that all penalties be proportioned to the nature of the offense."

The sentence imposed here was "within the limits prescribed by statute"; it did not depart "from the fundamental law and its spirit and purpose," and was "proportioned to the nature of the offense".

We therefore affirm the judgment of the trial court.

Judgment affirmed.

SEIDENFELD, P. J. and GUILD, J. , concur.

STATE OF ILLINOIS

APPELLATE COURT

8 I.A.³ 48

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge
HONORABLE SAMUEL O. SMITH, Judge
HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 25th day
of October A. D. 1972, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:



STATE OF ILLINOIS
IN THE APPELLATE COURT
FOURTH DISTRICT

| | | |
|------------------------|---|---------------|
| PEOPLE OF THE STATE OF |) | |
| ILLINOIS, |) | |
| |) | |
| Plaintiff-Appellee |) | |
| |) | |
| vs |) | |
| |) | |
| RICKIE SEYMOUR and |) | Appeal from |
| LOUIS S. PARTIN, |) | Circuit Court |
| |) | Macon County |
| Defendants-Appellants |) | |

MR. JUSTICE SIMKINS delivered the opinion of the Court.

The Illinois Defender Project moved to withdraw as defendants' counsel and accompanied the motion with a brief in conformity with *Anders v State of California* 386 U.S. 738, 18 L.ed, 2d 493, 87 S.Ct. 1396. The record shows proof of service of the motion and of the brief filed upon the defendants. The motion was continued for the defendants to file any further or additional suggestions. Each defendant responded by means of letters addressed to the Clerk of the Court. We have considered the letters of each of the defendants.

It is a fair summary of the contents of the letters to state that each defendant protests his innocence and recites matters which are dehors the record.

In discharge of our responsibility we have examined the record. The defendants were charged in a two count indictment with robbery and burglary. Pursuant to a negotiated plea the defendants entered pleas of guilty to the robbery indictment and the State dismissed the burglary indictment. Each defendant was sentenced to indeterminate terms of two to fourteen years to run concurrently with sentences imposed in Sangamon County on another offense. These sentences were recommended to the Court in conformity with the terms of the negotiated plea.

The record reveals that both the People and the Trial Judge fully complied with the terms of the negotiated plea. Search of the record further establishes complete compliance, on the part of the Trial Judge with the requirements of Supreme Court Rule 402. The record amply supports the trial court's finding that the plea was an intelligent, knowing and voluntary plea and we agree that the record discloses no justiciable issue for review and that the appeal is without merit and frivolous. Accordingly, the petition of the Illinois Defender Project to withdraw as counsel for the defendants is allowed and the judgments of the trial court are affirmed.

Judgments affirmed.

Smith, J. and Craven, P.J. concur.



STATE OF ILLINOIS

8 I.A.³ 49

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 25th day
of October A. D. 1972, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

General No. 11877

Agenda No. 72-161

STATE OF ILLINOIS
IN THE APPELLATE COURT
FOURTH DISTRICT

PEOPLE OF THE STATE OF
ILLINOIS.

Plaintiff-Appellee,

VS

JERRY BECK,

Defendant-Appellant.

Appeal from Circuit Court
Sangamon County

MR. JUSTICE SIMKINS delivered the Opinion of the Court.

The Illinois Defender Project moved to withdraw as defendant's counsel and accompanied the motion with a brief in conformity with *Anders v State of California* 386 U.S. 738, 18 L.ed, 2d 493, 87 S.Ct. 1396. The record shows proof of service of the motion and of the brief filed upon the defendant. The motion was continued for the defendant to file any further or additional suggestions. None were filed.

Under date of September 8, 1972, the defendant addressed a communication to the Clerk of this Court advising the Clerk that after going over the record in the instant case, the



defendant had reached the conclusion that the appeal was frivolous and that it would be of no avail to pursue the appeal any further. Despite this communication from the defendant, we have examined the record.

The defendant was charged in a two count indictment with the offenses of Unlawful possession of marijuana and Unlawful possession of a controlled substance, Lysergic Acid Diethylamide, which is L.S.D. Counsel was appointed and the defendant pled guilty to both offenses on January 3, 1972. His petition for probation was denied and the Court imposed concurrent sentences of one to three years on the marijuana possession charge and one to five years on the L.S.D. possession charge.

The record demonstrates careful and complete compliance, by the trial judge, with the requirements of Supreme Court Rule 402. A factual basis for the plea was established and the record amply supports a finding that the plea was voluntary, knowing and intelligent. The defendant had been convicted on two previous occasions for drug possession and on one occasion for possession of a needle and syringe. The sentences imposed are within the statutory limits and we agree that the record discloses no justiciable issue for review and that the appeal is without merit and frivolous. Accordingly, the petition of the Illinois Defender Project to withdraw as counsel for the defendant-appellant is allowed and the judgment of the trial court is affirmed.

Affirmed.

Smith, J. and Craven, P.J. concur.



87 T.A.³ 87

| | | |
|----------------------------------|---|------------------|
| PEOPLE OF THE STATE OF ILLINOIS, |) | APPEAL FROM |
| |) | CIRCUIT COURT |
| Plaintiff-Appellee, |) | COOK COUNTY |
| |) | |
| vs. |) | _____ |
| |) | |
| SYLVESTER ROBINSON, |) | HONORABLE |
| |) | JOHN J. CROWLEY, |
| Defendant-Appellant. |) | PRESIDING. |

MR. JUSTICE LEIGHTON delivered the opinion of the court:

By a complaint filed in the municipal department of the circuit court, defendant was charged with theft. He pled not guilty, waived trial by jury, was convicted and sentenced to serve six months in the House of Correction in Chicago. After being advised of his right to appeal, defendant expressed the desire to have his case reviewed in this court. Accordingly, the Public Defender was appointed to represent him in this appeal.

Now the Public Defender has filed a motion for leave to withdraw as defendant's counsel. In the motion, and a brief in support, the Public Defender represents that the only ground that can be urged in support of defendant's appeal is that he was not proven guilty beyond a reasonable doubt.

The record shows that a police officer testified to having seen defendant and a co-defendant (not involved in this appeal) with the property that was stolen. The owner identified the property as his. Defendant and his co-defendant testified that they were walking down a street when they found the property on the sidewalk. In their defense, they claimed that they were only carrying the stolen property when the police arrested them.

It is obvious that the trial court did not believe this defense. The Public Defender tells us that he is "[n]ot able to conscientiously argue that reasonable men must accept the defense theory and must reject the State's evidence." In his brief, filed in compliance with Anders v. California, 386 U.S

738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), the Public Defender has cited authorities to support his analysis of the record and his conclusion that defendant's appeal in this case is wholly frivolous and without merit.

Defendant was served with notice of the Public Defender's motion and with a copy of the brief. In addition, on May 3, 1972, we directed that a letter be mailed to defendant calling his attention to the Public Defender's motion to withdraw as his counsel. We gave defendant until July 5, 1972 to file any point he desired in support of his appeal. Defendant did not respond.

We have examined the record on appeal. The proceedings comply with Anders v. California, supra. We conclude there is no merit in this appeal and that for defendant to pursue it would be frivolous. Therefore, the Public Defender's motion for leave to withdraw as defendant's appellate counsel is granted. The judgment is affirmed.

Affirmed.

Stamos, P.J. and Schwartz, J., Concur.

Publish abstract only.



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| | | |
|----------------------------------|---|-------------------------|
| PEOPLE OF THE STATE OF ILLINOIS, |) | |
| |) | |
| Plaintiff-Appellee, |) | |
| |) | |
| |) | Appeal from the Circuit |
| |) | |
| v. |) | Court of Cook County. |
| |) | |
| |) | |
| ERNEST WILSON, |) | John J. Crowley, M. |
| |) | |
| Defendant-Appellant. |) | |

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

Ernest Wilson was charged with committing a battery upon Grover Davis in violation of Ill.Rev.Stat., 1971, ch. 38, para. 12-3. He was tried by the court, found guilty and sentenced to six months confinement at the Illinois State Farm.

The public defender, who was appointed to represent Wilson on appeal, has filed a motion to withdraw. The motion, supported by a brief pursuant to Anders v. California, 386 U.S. 738 (1967), states that the only basis for an appeal would be that the evidence did not establish Wilson's guilt beyond a reasonable doubt. The brief concludes that it cannot be conscionably argued the trial court's decision was incorrect.

The defendant was notified of the motion and a copy of his counsel's brief was sent to him. He was informed that he could file whatever contentions he wished in support of his appeal. He has not responded.

We have read the record and concur in the opinion of the defendant's counsel that pursuing the appeal would be futile.

Grover Davis testified that the defendant, gun in hand, approached him on the street at midday and started to talk to him. Davis said he did not want to talk and turned away. The defendant fired two shots one of which struck Davis in the arm. Davis ran, fell and was shot at again. The defendant admitted seeing Davis but denied speaking to him or shooting him. He testified he was in court on a disorderly charge the morning of the alleged shooting.

The outcome of the case rested on the trial court's determination of the credibility of the two witnesses. A court of review will not reverse the decision of the trier of fact simply because the testimony of witnesses is conflicting. The evidence was not so unsatisfactory as to leave a reasonable doubt of the defendant's guilt. People v. Catlett, 48 Ill.2d 56, 268 N.E.2d 378 (1971).

The motion to withdraw is allowed and the judgment is affirmed.

Affirmed.

McGlooin, P.J., and McNamara, J., concur.



87A 3 131

No. 56210

| | | |
|----------------------------------|---|---------------------|
| PEOPLE OF THE STATE OF ILLINOIS, |) | APPEAL FROM THE |
| |) | CIRCUIT COURT OF |
| Plaintiff-Appellee, |) | COOK COUNTY. |
| |) | |
| vs. |) | |
| |) | |
| BARRY CRAFT, |) | HONORABLE |
| |) | WALLACE I. KARGMAN, |
| Defendant-Appellant. |) | PRESIDING. |

MR. PRESIDING JUSTICE MCGLOON delivered the opinion of the court:

This is an appeal from an order of the circuit court finding the defendant in contempt of court for failure to respond to a subpoena duces tecum. Defendant argues that there can be no finding of contempt for his failure to respond when the subpoena was issued prior to the filing of any cause of action. The State argues that the subpoena was validly issued, and the contempt order was proper.

We reverse.

On August 13, 1971, the defendant, manager of the Image Theater in Chicago, was served with a subpoena duces tecum. The subpoena ordered that he appear in circuit court on August 16 and that he produce certain motion pictures then being shown to the public at the theater. The subpoena was issued as a result of a special order entered by the trial court setting August 16 as the date of a hearing to determine whether the named motion pictures were obscene.

On August 16 the defendant appeared and immediately moved to quash the subpoena, which motion was denied. Defendant then refused to produce the films, and an order was entered finding him in contempt of court. Afterwards the scheduled hearing continued. Oral testimony of witnesses who had seen the films were taken, and on the basis of this testimony the films were found to be obscene, and defendant was then charged with the offense of obscenity. Ill. Rev.Stat. 1969, ch.38, par.11-20.

In this appeal the defendant argues that the use of the subpoena duces tecum was invalid because at the time of its issuance no cause of action was then pending before the court. We

agree. Section 62 of the Illinois Civil Practice Act states in part:

The clerk of any court in which an action is pending shall, from time to time, issue subpoenas to those witnesses and to those counties in the State as may be required by either party**** An order of the court is not required to obtain the issuance by the clerk of the subpoena duces tecum. (Ill.Rev.Stat. 1969, ch.110, par.62.)

The wording of our statute indicates that as a prerequisite to the issuance of a subpoena some cause or preexisting matter be pending before the court. The historical function of the subpoena is to aid the parties in the resolution of litigation not to initiate it. There was no cause of action pending in the trial court when it issued this subpoena. Therefore, the subpoena was invalid, and defendant cannot be punished for his refusal to respond to it. Authority from another jurisdiction based on an identical fact situation and a statute substantively similar to our own reaches the same conclusion. Commonwealth v. Polar (1970), 438 Pa.67, 263 A.2d 354.

The first amendment forbids any massive seizure of possibly privileged material before an adversary hearing has been conducted at which the material has been determined to be obscene. (Marcus v. Search Warrant (1961), 367 U.S. 717; Quantity of Books v. Kansas (1964), 378 U.S. 205.) The holdings in these cases have been extended to the seizure of motion pictures which are shown in public theaters. (Joseph Burstyn, Inc. v. Wilson (1952), 343 U.S. 495; Metzger v. Percy, (7th cir. 1968) 393 F.2d 202; Cambist v. Duggen (3rd cir. 1969) 420 F.2d 687.) The situation in regard to motion pictures is further complicated by the fact that some courts have recognized that a seizure of only one copy of a film can be a "massive seizure" within the meaning of that term as used in the aforementioned cases, because the seizure of even a single copy effectively prevents the communication of any idea contained therein to the potentially large audience that would have viewed it. Bethview Amusement Corp. v. Cahn, (2nd cir. 1969) 416 F.2d 410;

Astro Cinema Corp. v. Mackell, (2nd cir. 1970) 422 F.2d 293.

In an attempt to comply with the requirement of conducting an adversary hearing prior to seizure, the circuit court issued the subpoena that is the subject of this appeal. It was the intention of the trial judge to view the films and thereby determine whether they were obscene. But, as we hold today, a subpoena duces tecum is not the proper instrument to initiate these proceedings.

For these reasons the subpoena duces tecum is vacated, and the judgment is reversed.

Judgment reversed.

DEMPSEY and McNAMARA, JJ., concur.



87.A. ³ 135

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| | | |
|----------------------------------|---|--------------------|
| PEOPLE OF THE STATE OF ILLINOIS, |) | APPEAL FROM |
| |) | CIRCUIT COURT |
| Plaintiff-Appellee, |) | OF COOK COUNTY. |
| |) | |
| v. |) | |
| |) | |
| ROBERT FLANNAGAN (IMPLEADED), |) | HONORABLE |
| |) | ROBERT J. DOWNING, |
| Defendant-Appellant.) |) | PRESIDING. |

MR. JUSTICE DRUCKER delivered the opinion of the court:

Defendant, Robert Flannagan, and Timothy Chichester were charged with the murder of Carlos Garcia. Ill. Rev. Stat. 1969, ch. 38, par. 9-1. They pleaded not guilty before Judge Joseph Power on January 13, 1970. The case was assigned for trial to Judge Frank Wilson. On the same day defendant moved for a "Substitution of Judge." The motion was granted and the case reassigned to Judge Robert J. Downing. Defendant was represented by a private attorney and various discovery motions were submitted to the court. Various continuances were agreed to by both parties and on May 25 defendant's attorney moved to withdraw from the case; the motion was granted. Subsequently two attorneys were appointed by the court to represent the defendant. Further discovery was sought and on August 5 defendant moved for a severance. The motion was granted on October 23. On December 28 defendant changed his plea from not guilty to guilty. After proceedings that will be set forth shortly hereafter, defendant was found guilty of voluntary manslaughter and sentenced to a term of seven to twelve years.

The Public Defender was appointed to represent defendant on appeal and he now moves for permission to withdraw as attorney of record. He has filed a brief in support of his motion pursuant to Anders v. California, 386 U.S. 738. A copy of the motion and the accompanying brief were mailed to defendant on May 30, 1972. Defendant was advised that he had until September 5, 1972, to file

any points in support of his appeal. On June 9 defendant moved for a change of counsel. This motion was denied on June 19. No other correspondence has been received.

In the Public Defender's motion to withdraw he has stated that after reviewing the common law record and the transcript of the proceedings, it was his belief that the only basis for an appeal would be whether the court properly admonished the defendant of the significance and consequences of his change of plea from not guilty to guilty.

On December 28, when defendant changed his plea, the following took place:

DEFENSE COUNSEL: Your Honor, we would like to have a conference on this matter and believe we may be able to dispose of it, with you and the State's Attorney and our client.

THE COURT: Mr. Flannagan, you heard your counsel request of the Court a conference between your two attorneys on your behalf, and the State's Attorney, and the Court.

DEFENDANT: Yes, sir.

THE COURT: At such a conference certain matters may be discussed which may or may not be helpful to you; certain matters may be discussed which may or may not be harmful to you. You are not obligated to accept the results of the conference. You will be informed as to the results of the conference but you are not obligated to accept the same, * * *. Do you understand what I have said?

DEFENDANT: Yes, sir.

THE COURT: And do you knowingly and voluntarily consent to your attorneys to represent you in such a conference?

DEFENDANT: Yes, sir.

THE COURT: All right. We will pass it and they will advise you as soon as the conference is completed with respect to the results of the conference.

After the conference the following ensued:

THE COURT: Gentlemen, did you advise your client with respect to the results of the conference?

DEFENSE COUNSEL: Yes, Your Honor, and we advised him that the State would not withdraw the murder plea and insists on the murder plea, but that Mr. Flannagan would be willing to enter a general plea of guilty to the charge and recitation of the facts, as was done in chambers, and the Court would find the defendant guilty of voluntary manslaughter and impose a sentence of seven to twelve years.

THE COURT: You understand what your counsel has said?

DEFENDANT: Yes, sir.

The court then read each count of the indictment and asked the defendant if he understood the nature of the charges. The defendant responded, "Yes, sir."

The court then told the defendant what the statutory minimum and maximum sentences were for the offenses of murder and voluntary manslaughter and asked the defendant if he understood the possible penalties that could be imposed. The defendant responded, "Yes, sir." The proceedings continued as follows:

THE COURT: Understand that when you plead guilty there will be no trial of any kind, you waive the right to trial by jury and the right to be confronted with witnesses against you?

DEFENDANT: Yes.

THE COURT: Are you pleading guilty because, in fact, you are guilty of the charges in the indictment?

DEFENDANT: Yes, sir.

* * *

THE COURT: You understand that there has been a conference and you have been advised of the nature of the conference and the results of the conference, and apart from the possible sentence arising out of the conference, has there been any force, threats or promises used to compel or induce you to plead guilty?

DEFENDANT: No.

THE COURT: You understand you have the right to persist in your plea of not guilty?

DEFENDANT: Yes, sir.

THE COURT: Knowing all the matters about which I have just questioned you, do you still persist in your plea of guilty?

DEFENDANT: Yes, sir.

The State's Attorney then related what witnesses he could call and to what facts they would testify. Defense counsel stipulated to the truth of the available testimony as recited by the State's Attorney. In short, the facts narrated showed that the defendant beat Carlos Garcia to death in an alley at 3:00 A.M. on September 22, 1969. The court then found defendant guilty of voluntary manslaughter and entered a judgment to that effect. After a hearing in aggravation and mitigation, the court sentenced defendant to a term of seven to twelve years.

We agree with the Public Defender that defendant was adequately admonished as to the significance and consequences of his change of plea from not guilty to guilty. Guidelines to be followed in accepting a plea of guilty are set forth in Supreme Court Rule 402. Ill. Rev. Stat. 1971, ch. 110A, par. 402. As can be noted from what has been set forth in this opinion, the trial judge precisely complied with every provision of the rule.

We have made "a full examination of all the proceedings" as required by Anders in addition to reviewing the brief filed by the Public Defender. We find that there are no legal points "arguable on their merits" and that the appeal is wholly frivolous. A plea of guilty waives all errors that are not of a jurisdictional nature. People v. Brown, 41 Ill.2d 503, 244 N.E.2d 159.

The Public Defender is given leave to withdraw, and the judgment of the circuit court is affirmed.

AFFIRMED.

Lorenz, P.J., and English, J., concur.

Abstract only.

10/27/12.

State of Illinois)
Appellate Court) ss: .
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Acting Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable MEL ABRAHAMSON, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

November 8, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

29/12.

1000000

FILED
OCT 9 1972

Abstract

NO. 72-35

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED
OCT 9 1972
HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

| | | |
|----------------------------------|---|-------------------------|
| PEOPLE OF THE STATE OF ILLINOIS, |) | |
| |) | |
| Plaintiff-Appellee, |) | Appeal from the Circuit |
| |) | Court of Winnebago |
| v. |) | County, Illinois. |
| |) | |
| BRUCE ALLISON, |) | |
| |) | |
| Defendant-Appellant. |) | |

MR. JUSTICE THOMAS J. MORAN delivered the opinion of the court:

Defendant, together with three co-defendants, was charged with rape and aggravated kidnapping. On December 13, 1967, he pled guilty to aggravated kidnapping and was sentenced to the penitentiary. On July 17, 1970, he filed a pro se petition for post conviction relief, counsel was appointed and a hearing was held.

While defendant's amended petition recited various errors, proof at the hearing related only to the assertions that, (a) his retained trial counsel promised he would receive probation, and (b) trial counsel's representation of three co-defendants was detrimental to his rights.

27/12.

In support of the petition, defendant's father testified that, prior to the plea, trial counsel told him "there was absolutely no probation" for the offense of forcible rape but "there would be a chance of probation" for the offense of aggravated kidnapping.

Defendant testified that, after having been advised by counsel, he understood he could not "file for probation" if he pled guilty to forcible rape, but that counsel "guaranteed" he would receive probation if he pled guilty to aggravated kidnapping.

Defendant's trial counsel testified that he had at no time promised defendant probation; that he had explained the statutory prohibition of probation on conviction of forcible rape; that he had explained that defendant had a right to file for probation under the kidnapping charge but that at no time were negotiations toward probation entered into with the State's Attorney or discussed with the judge and that no agreement was made with the defendant regarding probation.

The court inquired if there had been a statement or confession made by one of the defendants. Defendant's trial counsel replied that there had been and that the confession implicated the defendant. This was the totality of the evidence pertinent to the confession; neither the confession nor the original record of proceedings were introduced into evidence.

The trial judge denied post-conviction relief.

Defendant, on appeal, abandons his claim that retained counsel promised probation in exchange for the guilty plea and, in a brief replete with unsubstantiated, conclusionary statements, alleges, first, that defendant was denied effective assistance of counsel in that his retained counsel "mention(ed) to his client the 'right to file for probation'..."; that by informing defendant that probation is not permitted on conviction of forcible rape but is not statutorily barred in aggravated kidnapping, counsel was guilty of deception, of misleading his client, and of obscuring the truth.

2-112.

This theory, never raised in the trial court, is improperly before us. (See, People v. Brown, 41 Ill. 2d 230, 233 (1968) and People v. Eldredge, 41 Ill. 2d 520, 528 (1969).) Nonetheless, defendant has failed to show that it is an infringement of a constitutional right for his counsel to apprise him of the consequential differences between two criminal charges. We, therefore, find no substance to such contention.

Defendant next contends that trial counsel's lack of understanding of the admissibility of a co-defendant's confession implicating defendant, deprived him of competent counsel.

As earlier stated, the total evidence relating to the subject of the confession is the court's question and trial counsel's response. Defendant has never urged that the confession induced him to enter the plea of guilty. From this basis, counsel here presumes that trial counsel "closed his mind to the defendant's cause after ingesting an inadmissible co-defendant's confession." No basis for such conjecture is offered in the proof and we find no merit to such claim. (For a similar contention, see, People v. Harper, 43 Ill. 2d 368, 372-373 (1969).)

Finally, it is alleged that Supreme Court Rule 651 (c) was not followed, but defendant does not elucidate. Instead he argues that his pro se petition "did not meet the statutory requirement that the petition identify the proceedings in which he was convicted" (Ill. Rev. Stat. 1969, ch. 38, sec. 122-2) and that "on appeal, it is not even known the length of the petitioner's sentence, even though petitioner raised an issue about the sentence."

Defendant would now have us rely on the undefined shortcomings of his own petition as grounds for reversal. This we will not nor need do. The amended petition clearly identified the original proceedings.

27/12.

The fact that the length of petitioner's sentence is not found in the record on appeal does not influence this Court. In a post-conviction hearing, the burden is on the petitioner to show that he was deprived a substantial constitutional right. (People v. Smith, 45 Ill. 2d 399, 404 (1970); People v. Wease, 44 Ill. 2d 453, 457 (1970).) Defendant has failed in his burden and the judgment of the trial court is affirmed.

Judgment affirmed.

ABRAHAMSON and GUILD, J.J. - Concur

29/12.

FILED
OCT 31 1972

No. 71-166

Walter T. Simmons
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

8 I.A.³ 230

| | | |
|----------------------------------|---|----------------------------------|
| PEOPLE OF THE STATE OF ILLINOIS, | : | |
| | : | Appeal from the Circuit Court of |
| Plaintiff-Appellee, | : | Alexander County. |
| | : | |
| v. | : | _____ |
| | : | |
| JAMES WILSON, | : | Honorable Trafton Dennis, |
| | : | Judge Presiding. |
| Defendant-Appellant. | : | |

MR. JUSTICE EBERSPACHER delivered the opinion of the court:

The defendant, James Wilson, has brought this appeal from a judgment of conviction entered by the Circuit Court of Alexander County.

The defendant had been found guilty by a jury of the offense of criminal damage to property, in violation of section 21-1 of the Criminal Code, Ill.Rev.Sta. Chap. 38. He received a sentence of one year probation by the Circuit Court of Alexander County.

Sometime around midnight on the evening of April 18, 1970, Kenneth Moore was watching television with his wife in their apartment. Kenneth Moore, a police officer, was off duty. The apartment was located on the second floor at the intersection of 10th Avenue & Commercial Street in Cairo, Illinois. Moore testified at the trial that he was interrupted by the sound of loud talking as though "a party was going on outside". The night was warm and the apartment windows were open. Moore went to a window and saw four people across the street. He further stated that he saw one of the four kicking windows in the business establishments across the street. Kenneth Moore testified that he identified the defendant at that time having known him previously. Moore testified that he saw the defendant "kick the window at P. M. Hirsch, which evidently broke. I heard the sound of glass falling to the sidewalk." The observations were made from a distance of from 200 to 300

feet. Moore, who did not have a telephone in his apartment, then left his apartment and in his auto sought a policeman, which he found, and to whom he told what he had witnessed.

On cross-examination Moore testified as to the description of the four individuals, the clothes that they were wearing, and with which foot the defendant kicked. The defense counsel then inquired into Moore's testimony at the preliminary hearing wherein Moore had testified that he didn't know what the persons were wearing, couldn't give a description of the persons, and didn't know with which foot the defendant kicked. Moore then concluded this aspect of the cross-examination by stating "I didn't study it too much going into that. I didn't know."

Officer Steve Thomas of the Cairo Police testified as the arresting officer and he testified that on the evening of April 18 he was told by Kenneth Moore "he had observed James Wilson, the defendant, kick at the windows at Blums' store." (P. N. Hirsch.) He also testified that there were two males and two females in the group from which the defendant was arrested. Officer Thomas testified without objection.

Patrolman Connel Smith, Jr. of the Illinois State Police also testified that he was present when the defendant was arrested and that there were two females present when the defendant was arrested.

Thomas and Smith both testified that the defendant was arrested when confronted by the Police on Commercial between Sixth and Seventh Streets.

A witness testified that the window was broken at the store and that it cost \$123.82 for the glass.

Finally for the People, Mr. Thurman, manager of the P. N. Hirsch store, identified People's Exhibit #3 as a lease extension between Mr. Hirschel Eichhorn and Mr. P. N. Hirsch of St. Louis. Mr. Hirsch owns a chain of department stores and operated the one that Kingery managed. The lease between Eichhorn and Hirsch commenced in 1950 and two extensions were admitted into evidence.

Kingery also testified that he did not know whether P. N. Hirsch Co., Inc.

was a Missouri or an Illinois Corporation, that he was not a corporate officer and he was not knowledgeable as to whether there were ever any resolutions of the board authorizing the signature of the lease extension. Further testimony in regard to the lease was not allowed upon the defendant's objection, the court stating that the documents spoke for themselves.

The defense presented its evidence wherein the defendant and four others testified. Their testimony was consistent that they, along with one other, walked along Commercial Street on the other side from the store and at no time were on the same side as the store; that when Moore first approached the group he stated that he didn't know who broke the window, that the group did know. Moore then identified the defendant as the one who broke the window. The defendant also testified that he was not told that he was under arrest until he was taken to the Police Headquarters.

The defendant presents two issues for review. First, was the evidence sufficient to prove the defendant guilty beyond a reasonable doubt? Second, did the prosecution prove a material element of the crime as charged, namely the existence of the corporation named on the indictment.

The defendant urges that because the State's principal witness testified at the trial with knowledge of facts that he stated at the preliminary hearing he did not know, his testimony was of doubtful credibility and thus entitled to little weight.

The law of this State has long been that the identification by one eyewitness to the crime will be sufficient without further corroboration. (People v. Jones, 4 Ill. App.3rd 888, 282 N.E.2d 273.) And it is the jury's function to resolve whether or not the testimony is entitled to belief. (People v. Dandridge, 4 Ill.App.3d 864, 282 N.E.2d 18.) A finding of guilty by the trier of fact will be disturbed only where the evidence is so unreasonable, improbable, or unsatisfactory as to leave a reasonable doubt of the defendant's guilt. People v. Thomas, 3 Ill.App.3rd 1079, 279 N.E.2d 784.

The defendant asserts that he was convicted on the basis of an identification which was of doubtful credibility. We have examined the record and find that the

discrepancy in the testimony of Kenneth Moore given at the preliminary hearing and at the trial was of a minor nature. Moore testified that his attention was drawn to the defendant and that the defendant was previously known by Moore and thus identified. Moore's testimony was also substantiated by the unobjected to testimony of the other police officers. We cannot find that the discrepancies, in the light of human nature are substantial, and minor discrepancies do not destroy the credibility of the witness but only affect the weight to be accorded the testimony. (People v. Martinez, 4 Ill.App.3rd 1072, 283 N.E.2d 268.) The jury has determined the weight to be given the testimony and we do not find it so unsatisfactory as to require a different determination.

Defendant next asserts that the prosecution failed to prove the existence of a corporation named on the indictment and thus failed to prove a material element of the crime. The indictment stated:

"In that he, the said James Wilson, knowingly damaged and broke the plate glass window on the north side of the front entrance of the P. N. Hirsch and Company, Inc., a Missouri corporation, at 901 Commercial Avenue, in the City of Cairo, County of Alexander, State of Illinois, without having the consent of the tenant P. N. Hirsch and Company, a Missouri corporation, and without having the consent of the owner, W. Hirschel Eichhorn, said damage less than \$150.00."

The indictment does not allege that the corporation owned the property. There was competent testimony by the store manager that defendant had no authority to do any work or to use the building and that he personally knew Mr. Eichhorn. The lease and the extensions thereto were placed in evidence and from an examination of the documents, it is clear that Mr. Eichhorn had been the lessor for a period of in excess of 20 years and for that duration had been receiving monthly payments. We find this to be credible evidence that Mr. Eichhorn was the owner of the premises, that the defendant was without any authority to effect any change in the building and there was other credible evidence that the owner suffered damage. The existence of a corporation lessee was not a material element of the crime that need be proven; ownership was sufficiently alleged and proven. We, therefore, do not find it

necessary to determine whether the existence of the corporation by "user" as provided in Ill.Rev.Stat. 1971 Ch. 38 §160-1 has been proven.

The judgment of the trial court is affirmed.

CONCUR:/S/ Caswell J. Crebs

CONCUR:/S/ George J. Moran

PUBLISH ABSTRACT ONLY

457

WILLIAM D. DIMMICK
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

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The first issue presented is whether nonadmissible evidence presented by the State at the hearing in aggravation and mitigation "should cause a reduction in the sentence". From a review of the record we find sufficient competent evidence to support the sentence of the trial court. While there was incompetent evidence presented at the hearing, the trial court noted that it was inadmissible and specifically stated that it would disregard it. We find nothing in the record to indicate that the court relied upon incompetent evidence, and where there is no showing that the court relied upon incompetent evidence received at a hearing in aggravation and mitigation in imposing sentence, it is presumed that the court recognized the incompetent nature of the evidence and disregarded it. (People v. Sawyer, 1 Ill.App.2d 1096, 275 N.E.2d 771 @772.) We find no substantial or justifiable reason to disturb

the sentence on the basis of that evidence.

The defendant also contends that the State's Attorney should not have prosecuted him because of certain statements made by the State's Attorney at that hearing in aggravation and mitigation indicating a conflict of interest. The colloquy that took place between the State's Attorney and the court with regard to the possible conflict is as follows:

State's Attorney: "Your Honor, I don't know, I feel like I should advise the Court, I have personal knowledge of some of the events of this defendant here, and I don't know what area I should get into because I represented him on some of the things that come up before, so I apprise the Court of this fact and ask the Court for direction on it, presentation of evidence in connection with that, be conflict if I presented the facts which are not, in fact, confidential but have occurred."

The Court: "Are you through with this witness?"

This took place during the cross-examination of a witness for the defendant in the hearing in aggravation and mitigation. We find no other mention or further inquiry of this possible problem of a conflict in the record of the proceedings of either the trial or the aggravation-mitigation hearing. We thus do not know what are "some of the things that came up before." The State's Attorney does make disclosure in the State's brief of what these things are, but the brief is not a part of the record, and thus we cannot resolve the issue on that basis. We do not in any way censure the State's Attorney's conduct, but we must note that the appellee's brief cites no cases in support of its contention that no error has been committed. The defendant has cited (People v. Curry, 1 Ill.App. 3rd 87, 272 N.E. 2d 669), which states in part:

"In People v. Gerold, 265 Ill. 448, 107 N.E. 165, the court discusses the question of the propriety of one who has represented an individual to subsequently engage in the prosecution of the individual for acts arising during the representation and holds such to be reversible error. The reasoning of the court and the philosophy expressed there is applicable here and this procedure was subject to the same infirmity.

"As the court stated in Gerold, at page 478: 'It is the glory of the legal profession that its fidelity to its clients can be

depended upon; that a man may safely go to a lawyer and converse with him upon his rights in litigation with absolute assurance that that lawyer's tongue is tied from ever discussing it. (United States v. Costen, 38 Fed.Rep. 24). This rule has been so strictly enforced that it has been held that an attorney, on terminating his employment, cannot thereafter act as counsel against his client in the same general matter, even though while acting for his former client he acquired no knowledge which could operate to the client's disadvantage in the subsequent adverse employment. (Pierce v. Palmer, Ann.Cas. 1912b, (R.I.) 181, and cases cited in note.) If this is the rule in civil cases the law will not be less strict in criminal proceedings, especially as to the duty in this regard resting upon counsel for the State. Such an officer is acting in a quasi-judicial capacity, and he and those associated with him should represent public justice and stand indifferent as between the accused and any private interest. It is as much the duty of the prosecuting attorneys to see that a person on trial is not deprived of any of his statutory or legal rights as it is to prosecute him for the crime with which he may be charged. (State v. Osborne, 20 Ann.Cas. (Ore.) 627). The canons of ethics of the American Bar Association and various State associations in this country are in accord on this subject with the rule just stated. An attorney cannot be permitted to assist in the prosecution of a criminal case if by reason of his professional relations with the accused he has acquired a knowledge of the facts upon which the prosecution is predicated or which are closely interwoven therewith. (Wilson v. State, 16 Ind. 392, Commonwealth v. Gibbs, 4 Gray, 146). The members of the profession must have the fullest confidence of their clients. If it may be abused the profession will suffer by the loss of the confidence of the people. The good of the profession, as well as the safety of clients, demands the recognition and enforcement of these rules. (State v. Halstead, 73 Iowa, 376). It is unnecessary that the prosecuting attorney be guilty of an attempt to betray confidence; it is enough if it places him in a position which leaves him open to such charge; and this disqualification may arise by reason of services rendered by him in a civil case as well as in a criminal case. (State v. Rocker, 130 Iowa, 239; 2 Thornton on Attorneys, secs. 693, 700). The administration of the law should be free from all temptation and suspicion, so far as human agencies are capable of accomplishing that object, and public policy strongly demands that one who has been employed on one side should not be permitted to appeal on the other side.'

"Our examination of the Code of Professional Responsibility adopted by the organized Bar of this State, leads us to the conclusion that the philosophy expressed and quoted above is fully applicable on an expending rather than a contracting basis today."

In accordance with these principals we must remand this cause to the Circuit Court of Wayne County, Illinois, for further proceedings. At such further proceedings the court shall inquire into the alleged conflict of interest, make appropriate findings and enter such orders as are consistent with this opinion.

Remanded, with directions.

CONCUR: /s/ Caswell J. Crebs

CONCUR: /s/ George J. Moran

PUBLISH ABSTRACT ONLY



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| PEOPLE OF THE STATE OF ILLINOIS, |) | APPEAL FROM |
| Plaintiff-Appellee, |) | |
| |) | CIRCUIT COURT, |
| vs. |) | |
| |) | COOK COUNTY. |
| JAMES BEVIEL, |) | |
| Defendant-Appellant.) |) | HON. ROBERT DOWNING, |
| | | Presiding. |

MR. JUSTICE BURKE delivered the opinion of the court:

Defendant was brought to trial on five separate indictments for the crime of armed robbery. At his arraignment the Public Defender of Cook County was appointed to represent him, and a plea of not guilty was entered as to each indictment. Subsequently, defendant withdrew his plea of not guilty and pleaded guilty to the charges of all indictments. He was sentenced to a term of two to six years on each indictment, the sentences to run concurrently.

The Public Defender of Cook County was appointed counsel for the defendant on appeal and has filed in this court a petition for leave to withdraw as appellate counsel. Pursuant to the requirements set out in the case of *Anders v. California*, 386 U.S. 738, the Public Defender also filed a brief in support of his petition, alleging that the appeal is, in effect, wholly frivolous and without merit. This court thereafter notified the defendant of the pending petition and granted him leave to file points in support of his appeal. Defendant has not responded.

The petition and brief of the Public Defender allege that the sole question which could be raised on appeal relates to whether the defendant was properly admonished as to the consequences of his change of plea from not guilty to guilty. The Public Defender concludes that the trial court properly admonished defendant and that

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an appeal would be without merit.

Our own review of the proceedings at the hearing on the change of plea discloses that the trial court's procedure is in substantial compliance with the requirements of the applicable statute and Supreme Court rule of this state. (Ill.Rev.Stat.1969, Chap.38, par. 115-2; Ill.Rev.Stat. 1971, Chap. 110A, par.402.) Further, our examination of the record in each of the cases, as required by the Anders decision, reveals no arguable error.

From all the circumstances disclosed by the record, we conclude that the appeal is frivolous and wholly without merit. The Public Defender of Cook County is accordingly granted leave to withdraw as counsel for defendant on appeal. The judgments of conviction are affirmed.

PETITION ALLOWED.
JUDGMENTS AFFIRMED.

GOLDBERG, P.J., and LYONS, J. concur.



8 I.A.³ 259

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| | | |
|----------------------------------|---|--------------------|
| PEOPLE OF THE STATE OF ILLINOIS, |) | |
| |) | APPEAL FROM THE |
| Appellee, |) | CIRCUIT COURT |
| |) | OF COOK COUNTY. |
| vs. |) | |
| |) | |
| JAMES NOBLIN, |) | HONORABLE |
| |) | ROBERT J. COLLINS, |
| Appellant. |) | PRESIDING. |

MR. JUSTICE LYONS delivered the opinion of the court:

The defendant, James Noblin, was indicted for armed robbery, a violation of Ill.Rev.Stat. 1969, ch.38, par.18-2. Following a trial by jury defendant was found guilty as charged and was sentenced to the Illinois State Penitentiary for not less than ten nor more than thirty years.

The Public Defender was appointed to represent defendant in this appeal. He now moves for leave to withdraw as attorney for defendant and has filed his motion and supporting brief pursuant to Anders v. California, 1967, 386 U.S.738. Notice of the motion and copies of the motion and supporting brief were sent to defendant on June 28, 1972. On July 20, 1972 this court directed a letter to defendant and again notified him of the Public Defender's motion for leave to withdraw. Defendant was given sixty days in which to respond to the Public Defender's motion or otherwise file points in support of his appeal. Defendant has not responded.

At trial, the uncontroverted testimony of five State witnesses established that defendant held up Malizia's Liquor Store, 305 North Cicero Avenue, Chicago, on December 18, 1969, and made off with a .32 caliber revolver and approximately \$200 in cash. About four weeks later, on January 14, 1970, defendant was arrested as the result of information supplied by two private citizens. At the time of his arrest, defendant was armed with the .32 caliber revolver which he had taken from the liquor

store during the robbery. Later, while being questioned in the police station, defendant admitted having committed the armed robbery of the liquor store. Defendant introduced no evidence at trial.

This court has carefully reviewed all of the evidence adduced on the trial and finds it entirely sufficient to have established defendant's guilt beyond a reasonable doubt. Moreover, we are satisfied that defendant was adequately represented by counsel and accorded full due process of law at all stages of the proceedings against him.

We are therefore constrained to agree with the Public Defender's assertion that any appeal would be wholly without merit and frivolous. The motion of counsel to withdraw is allowed and the judgment is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG, P.J. and BURKE, J., concur.



56457

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

JAMES MARVIN JACKSON and
RICHARD SUGGS,

Defendants-Appellants.

81.A³ 312

APPEAL FROM THE CIRCUIT

COURT OF COOK COUNTY.

Hon. Minor K. Wilson,
Presiding.

MR. JUSTICE McNAMARA delivered the opinion of the court:

Defendants were indicted for murder. Following a bench trial both were found guilty of that charge and each was sentenced to a term of 14 to 20 years in the penitentiary. On appeal defendants contend that they were not proved guilty beyond a reasonable doubt. Defendant Jackson also argues that he was denied a speedy trial.

On May 16, 1969 at about 10:00 p.m. on the 1700 block of West Madison Street in the City of Chicago, John Morris died as a result of a single knife wound in his right side. The following evidence was adduced at trial.

Lester Cokley, whose attendance at trial was secured through the issuance of a bench warrant, testified for the State that on the night in question he observed the deceased emerge from a liquor store. Cokley stated that he was proceeding from a nearby shoe store to his aunt's house. Cokley, having crossed from the south side of the street, was walking along the north side of Madison Street. Cokley saw defendant Suggs approach the deceased and ask him for a quarter. When the deceased refused, Suggs grabbed and held the deceased while defendant Jackson began striking him. Cokley, then about six feet away, observed Suggs take a knife from his pocket, and while still behind the victim, strike him with the knife. The witness thought that Suggs had stabbed the deceased more than once. Both defendants went through the deceased's pockets and then ran past Cokley while the deceased staggered toward a nearby hot dog stand. At this time the witness noticed blood on the victim's back. Cokley was well acquainted with the defendants and knew both of them for some time.

On cross-examination Cokley testified that he did not attempt to aid the deceased, nor did he make any immediate effort to inform the police of the incident. About six days later, at the Maxwell Street Police Station, Cokley informed Sergeant Sams of the Chicago Police Department of the killing. Cokley denied being under arrest at the time. Cokley testified that about a year prior to the killing in question he had an altercation with defendant Jackson concerning Cokley's girl friend. He said that it involved only "pushing in and pushing out." Cokley also testified that at a Coroner's inquest he had stated that he was walking on the south side of Madison Street when his attention was first drawn to the incident.

Sergeant George H. Sams of the Chicago Police Department testified that on May 22, 1969, while investigating the instant murder, he talked to Cokley at Cook County Hospital. Sams was at the hospital to question the victim of another incident, and Cokley was at the hospital because he was a friend of the second victim. After a brief conversation concerning the instant crime, Sams asked Cokley to accompany him to the police station to give a statement. At the station Cokley gave a written statement naming defendants as the assailants. Defendant Jackson then was taken into custody, and brought into a room in which the defendant was seated. When asked if this were the man he had named, Cokley at first hesitated and shook his head. Sergeant Sams asked Cokley to be truthful and reminded him that he had identified Jackson and Suggs by name and address. Cokley then stated that Jackson was one of the assailants. Sergeant Sams also testified that Cokley had never been a suspect and at no time had been placed under arrest or restrained in any manner.

John P. Mitchell, an employee of the nearby hot dog stand, testified for the defense that, although he did not see the incident, he observed the victim staggering. Mitchell further testified that he observed another man, not one of the defendants, with a knife in his hand. Mitchell stated that he had grown up with defendants and did not see them in the vicinity on the night of the instant killing.

Each of the defendants testified and denied any part in the slaying and stated that they were at other locations on the evening in question. Defendant Jackson offered two alibi witnesses to support his testimony. Jackson also testified that his fight with Cokley had occurred about a month before this incident, and that blows had been exchanged. Defendants also offered testimony that the shoe store which Cokley testified to visiting immediately prior to this occurrence closed at 6:00 p.m.

Sergeant Sams testified for the State on rebuttal that he had spoken to Mitchell about this crime several times previously, but that Mitchell never mentioned he observed a man holding a knife prior to his trial testimony.

The trial judge noted that the basic question of the case was one of the credibility of witnesses. He cited Mitchell's failure to mention until trial his seeing another man with a knife as quite odd, and further observed that Mitchell admittedly did not witness the incident. After noting that there were also discrepancies in Cokley's testimony, the court observed that, "These kinds of discrepancies too often occur in the testimony of a truthful witness." The court then found both defendants guilty of the murder of John Morris.

Defendants' first contention on appeal is that they were not proved guilty beyond a reasonable doubt. They argue that the controverted testimony of the sole occurrence witness contains such discrepancies as to be incapable of supporting a conviction.

The testimony of a single eyewitness, even where there are discrepancies present, is sufficient to support a murder conviction. People v. Riley, 31 Ill.2d 490, 202 N.E.2d 531. Discrepancies in the testimony of a witness do not necessarily destroy credibility. People v. Martinez, 4 Ill.App.3d 1072, 283 N.E.2d 268. And it is within the province of the trier of fact, with his superior opportunity to hear the testimony and observe the demeanor of witnesses, to judge the credibility of witnesses, choosing whom to believe and not to believe. People v. Hyde, 1 Ill.App.3d 831, 275 N.E.2d 239. On review the trier of

fact's judgment regarding the sufficiency of an identification by a sole eyewitness will not be disturbed unless the evidence is so improbable or unsatisfactory as to, as a matter of law, create a reasonable doubt of defendant's guilt. People v. Adams, --Ill.App.3d--, --N.E.2d--, No. 55653, 1972.

In the instant case, we find that defendants were proved guilty beyond a reasonable doubt. There is no question of Cokley's ability to identify the defendants. He knew both men for some time, and had an excellent vantage point to observe the killing. The trier of fact found Cokley to be credible, and we will not upset that determination. It is also obvious from an examination of the record that, despite defendants' contention, Cokley was not a vengeful witness, but rather he was quite reluctant to testify against the defendants. And as the trial judge noted, the types of discrepancies in Cokley's testimony "***often occur in the testimony of a truthful witness." The case most clearly on point is People v. Robinson, 3 Ill.App.3d 858, 279 N.E.2d 515.

In Robinson, as in the present case, there was a conviction of murder based on the identification testimony of a sole occurrence witness. There also the witness had previously known the men she identified, and the defendants interposed alibi defenses. The witness first gave her statement to police while in custody on another matter, and discrepancies regarding her viewpoint and incidental occurrences were also present in her testimony. Affirming the conviction on appeal, this court rejected the defendants' contention that the testimony of this sole eyewitness was not sufficient to establish guilt beyond a reasonable doubt. Similarly the evidence in the case at bar was sufficient to prove defendants guilty of murder beyond a reasonable doubt.

It is also argued on appeal that defendant Jackson's statutory right to a speedy trial was denied. Viewing the record most favorably toward defendant Jackson, he was brought to trial within 158 days of his initial trial demand. Ill.Rev. Stat. 1969, ch.38, par.103-5(b) provides:

(b) Every person on bail or recognizance shall be tried by the court having jurisdiction within 160 days from the date defendant demands trial unless delay is occasioned by the defendant***

The effective date for this statute was August 28, 1969, a date after the offense had been committed, but before defendant had been admitted to bail, and before defendant had made his trial demand. Defendant concedes that he was brought to trial within 160 days, but argues that this statute is invalid as an ex post facto law in its application to him. He urges that the predecessor statute, with a 120 day provision, should govern his statutory right to a speedy trial.

"A law relating to matters of procedure merely, and not depriving accused of any substantial rights or protection, is not ex post facto." 16A C.J.S. 154. The Illinois Supreme Court has clearly indicated in dictum that in such a situation where the offense occurred before the effective date of the statute but defendant's admission to bail and trial demand occurred after such date, the 1969 provision of par.103-5(b) is applicable. People v. Bombacino, 51 Ill.2d 17, 280 N.E.2d 697. And it has been held that an extension of the applicable statute of limitations during the period when the offense could originally have been prosecuted is not invalid. People v. Isaacs, 37 Ill.2d 205, 226 N.E.2d 38. In the present case similarly the statutory time limit within which certain procedures must be initiated by the State has been extended; an analogous result is inescapable. The second contention of defendant Jackson is without merit.

For the reasons stated, the judgment is affirmed.

Judgment affirmed.

McGLOON, P.J., and DEMPSEY, J., concur.



8 I.A.³ 351

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| PEOPLE OF THE STATE OF ILLINOIS, |) | APPEAL FROM |
| Defendant-Appellee, |) | |
| |) | CIRCUIT COURT, |
| vs. |) | |
| |) | COOK COUNTY. |
| HAROLD MOORE, |) | |
| Plaintiff-Appellant.) | | HON. SAUL A. EPTON, |
| | | Presiding. |

MR. JUSTICE BURKE delivered the opinion of the court:

Indictment No. 71-1848 charged defendant with two counts of armed robbery occasioned by his participation in the robbery of Suburban Television, Inc., in Matteson, Illinois on May 13, 1971. Indictment No. 71-2097 charged the defendant with one count of armed robbery occasioned by his participation in the armed robbery of the Blue Star Auto Company in Harvey, Illinois at approximately 1:30 P.M. on April 23, 1971.

On arraignment a plea of not guilty was entered on each indictment and the Public Defender was appointed to represent defendant.

On August 9, 1971 these cases came on for trial and the not guilty pleas in cases No. 71-2097 and 71-1848 were withdrawn and pleas of guilty were entered by defendant to armed robbery in each case.

After the trial court admonished defendant of his rights, his pleas of guilty were accepted.

The court heard testimony stipulated by the state and defendant through his attorney. After hearing testimony on aggravation and mitigation, the court sentenced defendant to a term of two years to two years and one day in each case, the sentences to run concurrently.

An appeal was taken from the judgment in case No. 71-2097 for armed robbery and the sentencing of defendant for a term of two years to two years and one day; said sentence to run con-

currently with No. 71-1848 (not appealed).

The Public Defender was appointed counsel for the defendant on appeal and has filed in this court a petition for leave to withdraw as appellate counsel. Pursuant to the requirements set out in the case of *Anders v. California*, 386 U.S. 738, the Public Defender also filed a brief in support of his petition, alleging that the appeal is frivolous and without merit. This court thereafter notified the defendant of the pending petition and granted him leave to file points in support of the appeal. Defendant has not responded.

The petition and brief of the Public Defender allege that the sole question which could be raised on appeal would be whether the trial court fully admonished defendant as to the significance and consequences of changing his plea from not guilty to guilty. The Public Defender concludes that the trial court properly admonished defendant and that an appeal would be without merit.

A review by the court of the proceedings at the hearing for change of plea reveals that the procedure followed by the trial court is in substantial compliance with that required by the statute and the Supreme Court Rule of this state governing the matter. (Ill.Rev.Stat.1971, Chap. 38, Para. 117-3; Supreme Court Rule 402, Ill.Rev.Stat.Chap. 110A, par.402.)

Examination of the record by this court, as required by the *Anders* decision reveals one additional matter alluded to by the Public Defender which could possibly be raised as error committed below, namely the trial judge's denial of defendant's motion to vacate the guilty plea judgment in case No. 71-2097.

The record reflects that four days after defendant's

conviction in case No. 71-2097 on a plea of guilty, he made a motion to vacate the guilty plea judgment and requested a trial.

In his motion defendant maintained as follows:

"That counsel from the Public Defender's office, appointed to represent defendant, engaged in a conference with the state's attorney and the Court on both indictments (71-2097; 71-1848) and agreed on a sentence of two years to two years and one day in exchange for a plea of guilty on both indictments.

"Pleas of Guilty were entered.* * * Not until the reading of the stipulated facts did defendant know that the robbery in Indictment 71-2097 was committed April 23, 1971 at 1:36 P.M. at 154th and Myrtle. On that day and time, defendant was at his place of employment for Pollack Electrical Supply Company at 2017-19 West Division, Chicago, Illinois."

Permission to withdraw a plea of guilty and enter a plea of not guilty is a matter within the discretion of the court. People v. Morreale, 412 Ill. 528, 107 N.E.2d 721.

The trial court conducted an extensive hearing concerning defendant's motion to withdraw his plea of guilty comprising forty-six pages of the transcript of proceedings. The principal witness examined during the hearing was Mr. Philip Gordon, Vice-President of Pollack Electrical Supply Company, the employer of defendant. Mr. Gordon testified as to time sheet records which allegedly showed that defendant was at his place of employment at the time the armed robbery alleged in case No. 71-2097 was committed.

Upon conclusion of the hearing on defendant's motion, the trial judge stated:

"I examined those records. I am not impressed with records kept by this gentlemen (Gordon). * * * Your motion to vacate is denied."

The credibility of the testimony in a post-conviction proceeding as in other cases tried by the court without a jury is

for the trial judge to determine, and unless something appears to show that the determination was manifestly erroneous, the trial judge, who had an opportunity to see and hear each witness, should be upheld. *People v. Thomas*, 20 Ill. 2d 603, 170 N.E.2d 543; *Davies v. People*, 10 Ill.2d 11, 139 N.E.2d 216.

The record contains substantial evidence of defendant's guilt. There were two eye-witnesses to the armed robbery both of whom identified defendant as one of the robbers.

Based upon a complete review of the record, we cannot say that the trial court's determination was manifestly erroneous and will not substitute our judgment for that of the trial judge who had an opportunity to see and hear the witnesses.

The trial court hearing defendant's motion to vacate the judgment in case No. 71-2097 did not abuse its discretion in denying the motion.

Further it appears from the record that the defendant acted with full understanding at every stage of the guilty plea proceeding and was not misled, coerced or wrongfully induced to enter the plea of guilty.

A properly accepted plea of guilty operates as a waiver of all defects and errors not jurisdictional. *People v. Scott*, 29 Ill. 2d 429, 194 N.E.2d 197; *People v. Popescu* 345 Ill. 142, 177 N.E. 739. We are of the opinion that defendant's plea was properly accepted and therefore constituted a waiver of all alleged defects and errors. There is no question as to the jurisdiction of the trial court in this case.

From all the circumstances disclosed by the record we conclude that the appeal is frivolous and wholly without merit.

The Public Defender of Cook County is accordingly granted leave to withdraw as counsel for the defendant on appeal. The judgment is affirmed.

PETITION ALLOWED.
JUDGMENT AFFIRMED.

GOLDBERG, P.J., and LYONS, J. concur.



PEOPLE OF THE STATE OF ILLINOIS,) APPEAL FROM
Plaintiff-Appellee,)
vs.) CIRCUIT COURT,
CHARLES ROGERS,) COOK COUNTY.
Defendant-Appellant.) HON. FRANK J. WILSON,
Presiding.

MR. JUSTICE BURKE delivered the opinion of the court:

Defendant was indicted for the crime of murder. At his arraignment the Public Defender of Cook County was appointed to represent him and a plea of not guilty was entered. Subsequently defendant, being represented by court appointed private counsel, withdrew his plea of not guilty and pleaded guilty to the murder charge. He was sentenced to a term of 14 to 19 years in the Illinois State Penitentiary.

The Public Defender of Cook County was appointed counsel for the defendant on appeal and has filed in this court a petition for leave to withdraw as appellate counsel. Pursuant to the requirements set out in the case of *Anders v. California*, 386 U.S. 738, the Public Defender also filed a brief in support of his petition, alleging that the appeal is frivolous and without merit. This court thereafter notified the defendant of the pending petition and granted him leave to file points in support of the appeal. Defendant has not responded.

The petition and brief of the Public Defender allege that the sole question which could be raised on appeal would be whether the trial court fully admonished defendant as to the significance and consequences of changing his plea from not guilty to guilty. The Public Defender concludes that the trial court properly admonished defendant and an appeal would be without merit.

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A review by this court of the proceedings at the hearing for change of plea reveals that the procedure followed by the trial court is in substantial compliance with that required by the statute and the Supreme Court Rule of this state governing the matter. (Ill.Rev.Stat. 1971, Chap. 38, Para.117-3; Supreme Court Rule 402, Ill.Rev.Stat.Chap.110A, par. 402.)

Examination of the record by this court, as required by the Anders decision, reveals two additional matters which could possibly be raised as error committed below, namely the trial judge in the certified report of proceedings sentenced the defendant to a term of "not less than 14 nor more than 19 years" in the Illinois State Penitentiary whereas the judgment and the notice of appeal state defendant's sentence as "not less than 15 nor more than 19 years."

In this situation, we will exercise our power to amend the judgment. Supreme Court Rule 366 (a)(1), Ill.Rev.Stat. Chap.110A, par.366(a)(1). We also amend the notice of appeal pursuant to Supreme Court Rule 362(f), Ill. Rev. Stat. Chap.110A, par.362(f). Accordingly the judgment and notice of appeal are amended to provide that defendant is sentenced to a term in the Illinois State Penitentiary of "not less than 14 nor more than 19 years."

From all the circumstances disclosed by the record we conclude that the appeal is frivolous and wholly without merit. The Public Defender of Cook County is accordingly granted leave to withdraw as counsel for defendant on appeal.

The judgment is amended to conform to the sentence imposed by the trial judge in the certified report of proceedings, namely "not less than 14 nor more than 19 years" and as amended is affirmed.

PETITION ALLOWED.
JUDGMENT AFFIRMED AS AMENDED.

GOLDBERG, P.J., and LYONS, J. concur.



55735



| | | |
|---------------------------------|---|----------------------------|
| DENNIS MADIGAN, |) | |
| |) | |
| Plaintiff-Appellee, |) | APPEAL FROM THE CIRCUIT |
| |) | COURT OF COOK COUNTY. |
| vs. |) | |
| |) | |
| THE POLICE BOARD OF THE CITY OF |) | HONORABLE EDWARD F. HEALY, |
| CHICAGO, |) | Presiding. |
| |) | |
| Defendant-Appellant.) |) | |

MR. PRESIDING JUSTICE STAMOS delivered the opinion of the court.

In an action before the Police Board of the City of Chicago, Dennis Madigan, a Chicago police officer, was found guilty of violating Rules Two, Six, Seven and Ten of the Rules and Regulations of the Chicago Police Department. The pertinent findings of the Board were as follows:

* * *

5. Respondent as charged herein, contrary to the Rules and Regulations of the Department of Police is guilty of violating Rule 2, "Any Action or Conduct Which Impedes the Department's Efforts to Achieve Its Goals, or Brings Discredit Upon the Department", in that the conduct of the respondent as set forth in Findings 6, 7, 8, 9 and 10 thereof is not that which the department expects from a reasonable, prudent, diligent and cautious officer.
6. Respondent as charged herein, contrary to the Rules and Regulations of the Department of Police was guilty of violating Rule 2, "Any Action or Conduct Which Impedes the Department's Efforts to Achieve Its Goals, or Brings Discredit Upon the Department," in that the respondent, Dennis Madigan on September 27, 1968 did refuse to obey a lawful order of Lieutenant James Murphy relative to completion of an arrest.
7. Respondent as charged herein, contrary to the Rules and Regulations of the Department of Police was guilty of violating Rule 6, "Disobedience of an Order or Directive, Written or Oral", in that respondent, Dennis Madigan on September 27, 1968 did refuse to obey a lawful order of Captain Alfred Conrad relative to performance tests on an alcoholic influence report.
8. Respondent as charged herein, contrary to the Rules and Regulations of the Department of

Police was guilty of violating Rule 6, "Disobedience of an Order or Directive, Written or Oral", in that the respondent, Dennis Madigan on September 27, 1968 did refuse to obey a lawful order of Lieutenant James Murphy relative to taking a breath alcohol test.

9. Respondent as charged herein, contrary to the Rules and Regulations of the Department of Police was guilty of violating Rule 7, "Insubordination or Disrespect Toward a Supervisory Member", in that the respondent, Dennis Madigan on September 27, 1968 was disrespectful in manner and speech to his superior officer Lieutenant James Murphy.
10. Respondent as charged herein, contrary to the Rules and Regulations of the Department of Police was guilty of violating Rule 10, "Incompetency or Inefficiency in the Performance of Duty", in that said respondent has been the subject of several disciplinary actions, which together with the aforesaid rule violations constitutes evidence of non-competency in the performance of his duty, and thereby places him within the purview of Rule 10, "Incompetency or Inefficiency in the Performance of Duty".

As a result of the above findings, Madigan was suspended from his position as patrolman for a period of six months. He subsequently filed a complaint in the Circuit Court of Cook County, seeking administrative review of the Police Board's decision pursuant to the Administrative Review Act.¹ The Circuit Court reversed the decision of the Police Board. The Police Board appeals from that reversal.

The series of events resulting in the charges against Officer Madigan began shortly before noon on September 27, 1968. Madigan, off-duty, unarmed and in civilian attire, was having a drink in a tavern in the near north area of Chicago. He was accosted by a patron, Andrew Wiley, who threatened to kill him and brandished a gun. Madigan dove at Wiley and was joined in the fray by the owner, Merrill Spivak, and a patron, identified at a hearing as "Skippy." During the scuffle Madigan successfully unloaded the gun and Spivak seized it. Madigan demanded the gun from Spivak, who refused, because he "did not believe that people who have been drinking should handle firearms." Skippy took the gun from Spivak and deposited

1. Ill. Rev. Stat. 1969, ch. 110, par. 264-279.

it in the kitchen at the rear of the tavern. Madigan announced to Wiley that he was under arrest. Spivak telephoned for the police.

Lieutenant Murphy of the 18th District responded to the phone call. He conducted a 20 - 40 minute investigation of the incident. Madigan testified that he suggested that more men be summoned to assist in locating the gun and that the owner be arrested for obstruction of justice. Murphy ignored these suggestions. Madigan further testified that during the investigation he and Murphy were "definitely having words. After the gun was recovered, Madigan, Murphy and Wiley went to the 18th District police station. During the ride to the station Madigan said to Murphy, "I wound up getting a gun pulled on me and you are trying to fuck me," and "If you try to burn me you will be hearing from a lot of police captains." Upon their arrival at the station Murphy told Madigan to fill out an arrest report. Madigan responded that he wanted to make a phone call. Murphy reiterated his order to complete the arrest report, but Madigan disregarded the order and made a phone call instead.

Lieutenant Murphy then went to the office of Captain Conrad, a watch commander for the 18th District, and informed him of Officer Madigan's insubordination and possible intoxication. Conrad instructed Murphy to initiate an official investigation by obtaining a complaint register number from the Internal Investigations Division of the Chicago Police Department. He also suggested that a sobriety test be administered. A complaint register number was obtained, and Madigan was asked to participate in the visual portion of an alcohol influence test. Madigan testified that he declined to cooperate in the test unless someone from the 12th District, the district to which he was assigned to duty, was present to witness its administration. Murphy, however, testified that Madigan simply refused to cooperate in the test without explaining his reasons for such refusal. Conrad also ordered Madigan to perform various portions of the test, but Madigan again refused. It is

the contention of the Police Board that its findings were not contrary to the manifest weight of the evidence and should therefore have been affirmed by the Circuit Court. Officer Madigan responds that the findings were contrary to the manifest weight of the evidence, that he was not dismissed for "cause" and that the investigative procedures utilized by the 18th District personnel denied him Due Process of Law.

OPINION

In Davern v. Civil Service Commission, 47 Ill.2d 469, 471-472, 269 N.E.2d 713, our Supreme Court set forth the standards applicable to judicial review of administrative findings:

The Administrative Review Act provides that agency findings on questions of fact are "prima facie true and correct." (Ill. Rev. Stat. 1967, ch. 110, par. 274) We have construed this provision to limit the function of the reviewing court to ascertaining whether the findings and decisions of the administrative agency are against the manifest weight of the evidence. (Cases cited) The courts will not reweigh the evidence, but are limited to a determination whether the final decision of the administrative agency is just and reasonable in light of the evidence presented. (Cases cited) Neither the appellate court nor the trial court may substitute its judgment for that of the administrative agency. (Cases cited).

Officer Madigan contends that findings Six, Seven and Eight of the Police Board were against the manifest weight of the evidence because the orders which he disobeyed were not "lawful" orders. In support of this contention, he cites Chicago Police Department General Order 69-7, Sec. III, par. A(3) which states:

Superior ranking personnel will not assume command outside their own organizational structure except when failure to do so will seriously endanger the Department's reputation or its ability to maintain law and order.

It is argued that Lieutenant Murphy and Captain Conrad had no authority to assume command over Madigan, because he was not in their organizational structure, and because there existed no serious danger to the Department's reputation or its ability to maintain law and order. Therefore, it is urged, any orders they might have given to him were not lawful, and he was not required to obey.

Although it is undisputed that Officer Madigan was assigned to a different district than Lieutenant Murphy and Captain Conrad, the record reflects conflicting opinions as to whether their failure to assume command over Officer Madigan would have "seriously endanger[ed] the Department's reputation or its ability to maintain law and order." We believe, however, that the Police Board, after hearing all the testimony concerning the incident in the tavern and at the police station, could determine for itself whether the circumstances required assumption of command outside the organizational structure. Officer Madigan had made an arrest in the 18th District, and the supervisory personnel of that district properly assumed responsibility for investigating the arrest and for handling the necessary paper work. After making the arrest, Officer Madigan was "on duty,"² and his cooperation was clearly essential for the completion of those tasks. In addition, he had manifested characteristics of intoxication, thus obligating the supervisory officers to promptly determine if he was in fact intoxicated and, if so, whether that intoxication was in any way responsible for the arrest. An alcohol influence test was a reasonable means to that end. We believe that these facts were a sufficient basis upon which the Police Board could have concluded that extra-organizational assumption of command was necessary under the circumstances and that the orders given to Officer Madigan were "lawful." Therefore, findings Six, Seven and Eight were not contrary to the manifest weight of the evidence. There is also ample support in the record for finding Nine -- that Officer Madigan was disrespectful towards his supervising officer, Lieutenant Murphy. Finally, since findings Five and Ten were based substantially on the other findings, we conclude that they also were not contrary to the manifest weight of the evidence.

2. Rules and Regulations of the Chicago Police Department, Definitions, p. 15:

"ON DUTY

Engaging in any activity during specifically assigned hours or rendering any police service during an emergency situation."

Officer Madigan contends that the decision of the Circuit Court can be justified by the absence of "cause" to support his suspension. Section 1-18.1 of Article 10 of the Revised Cities and Villages Act³ prohibits the suspension of a police officer for more than 30 days except for "cause." A broad discretion is accorded the Police Board in determining what constitutes a proper cause for suspension, although it is essential to the validity of a suspension that it be based upon substantial misconduct or incapacity. (Zinser v. Board of Fire and Police Com'rs., 28 Ill.App.2d 435, 172 N.E.2d 33.) It has been held that disobedience of a proper order given by a superior officer constitutes such misconduct. (Zinser v. Board of Fire and Police Com'rs., 28 Ill.App.2d 435, 172 N.E.2d 33.) Refusal to submit to a polygraph test has also been held sufficient cause for suspension. (Coursey v. Board of Fire and Police Com'rs., 90 Ill. App.2d 31, 234 N.E.2d 339.) We hold that the Police Board did not abuse its discretion in concluding that Officer Madigan's disobedience of direct orders to complete an arrest form and to submit to an alcohol influence test constituted such substantial misconduct as to warrant suspension for "cause."

Officer Madigan also seeks to justify the reversal of his suspension on the grounds that the procedures utilized to investigate his alleged misconduct denied him due process of law. This contention has little merit. Due Process required that Officer Madigan "be given notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case." (Pettigrew v. National Accounts System, Inc., 67 Ill.App.2d 344, 350, 213 N.E.2d 778.) This was done. While we agree that the supervisory personnel of the 18th District did not conduct their investigation in full accordance with the letter and spirit of the Rules and Regulations pertaining to such investigations, we perceive no constitutional deprivation accruing to Officer Madigan as a result.

We hold that the findings of the Police Board were not contrary

3. Ill. Rev. Stat. 1967, ch. 24, par. 10-1-18.1.

to the manifest weight of the evidence, that Officer Madigan was suspended for "cause" and that the investigation of his misconduct did not deny him due process of law. We reverse.

REVERSED.

SCHWARTZ and LEIGHTON, JJ., concur.

(PUBLISH ABSTRACT ONLY)



91A.3 374

EMILY WEBER,

Plaintiff-Appellant,

vs.

FAY ROLLAND WEBER,

Defendant-Appellee.

)
) APPEAL FROM THE
) CIRCUIT COURT OF
) COOK COUNTY
)
) HON. SHELLY BROWN,
) JUDGE PRESIDING.
)
)

MR. JUSTICE BURMAN delivered the opinion of the court.

Plaintiff, Emily Weber, appeals from the denial of her petition for an increase in child support payments and for attorney's fees.

Plaintiff was granted a divorce from defendant, Fay Rolland Weber, on September 4, 1963. The decree ordered defendant to pay \$75 per week to plaintiff for the support of their five children. Both parties waived alimony. The parties also entered into a property settlement.

On January 30, 1969, plaintiff's child support allowance was increased to \$90 per week based on defendant's gross income of \$12,000 for the year 1968. On December 18, 1970, Emily Weber filed a petition in the Circuit Court for an increased child support allowance and for attorney's fees. Plaintiff alleged that the needs of the children had increased and that her former husband's earnings had increased as well. After a hearing, the court denied the petition. Plaintiff appeals from the trial court's order.

The record reveals that the defendant is remarried and resides with his wife, Andrea, and her two children. The defendant testified that he is employed by Devan, Inc., which operates out of his home, and that he is the manager of the

contracting firm. His wife does the secretarial work and makes out the payrolls. James H. Clark, called as a witness by plaintiff, testified that he is the sole owner of the business. He said the defendant signs the company checks under his direction.

There is a conflict in the record as to whether the \$250 per week received by defendant from the company represents the gross or net amount of his earnings. Plaintiff argues that it represents the net sum, and that defendant's gross earnings therefore amount to \$16,000 per year, an increase of \$4,000 per year over defendant's 1968 earnings. Defendant argues that his gross income is \$13,000, an insubstantial increase over his 1968 earnings. There was also testimony by plaintiff that her expenses in maintaining the children had increased since the entry of the last order directing defendant to pay \$90 weekly for their support.

The burden was on the plaintiff to show a change in the circumstances of the defendant which would have warranted a finding that he was financially able to pay an increased amount of child support. The order denying the increase was entered after an evidentiary hearing at which the trial judge saw and heard the witnesses. Whether the petition should have been granted was within the sound discretion of the trial court. We cannot say that the court abused its discretion in denying either the increase in child support or the attorney's fees requested. We therefore affirm in accordance with Supreme Court Rule 23, ch.110A, Ill. Ann. Stat. 1972, par. 23.

AFFIRMED.

DIERINGER, P. J., and

ADESKO, J., concur.

(Abstract only)



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|------------------------------------|---|-------------------------|
| PEOPLE OF THE STATE OF ILLINOIS,) |) | APPEAL FROM THE CIRCUIT |
| Plaintiff-Appellee,) |) | COURT OF COOK COUNTY |
| vs.) |) | |
| CLIFFORD BOONE,) |) | Hon. Saul A. Epton, |
| Defendant-Appellant.) |) | Presiding. |

Mr. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

Clifford Boone (defendant) was indicted for murder. (Ill.Rev.Stat. 1969, ch.38, par.9-1.) After trial by jury, he was found guilty and was sentenced to the penitentiary for 14 to 20 years. In this appeal, he contends that the State failed to rebut his evidence of self-defense and that the evidence at most suggests only guilt of manslaughter..

Defendant was 21 years old. His inamorata, the deceased, was 31 years of age and the mother of seven children. By a credible witness, the prosecution proved that defendant was seen in the act of stabbing the deceased, while in her back-yard, during the early morning hours. Before deceased expired, she told several persons that defendant had stabbed her. Defendant left the scene precipitately and surrendered to the police two weeks later. After receiving proper warnings, he told the police that deceased had "pulled a knife" on him; that he took it away from her and then started cutting her. Expert testimony by a pathologist showed that the deceased suffered 16 stab wounds from a sharp, quite long weapon. These wounds were generally on the left side of the body, including one in the back which penetrated to her chest.

Defendant testified in his own behalf that he and deceased had been drinking. They engaged in an argument after which the deceased ran into the house and returned with a butcher knife which she swung at him. After that, he remembered only that he grabbed her arm.

Mere statement of this evidence is a complete refutation of defendant's contentions. Whether the crime committed was murder or manslaughter, was a question of fact for the jury. (People v. Davis, 35 Ill.2d 55, 61, 219 N.E.2d 468.) Under the evidence here, it is difficult to see how any jury could return any verdict other than murder. The evidence here is not so unsatisfactory as to leave a reasonable doubt as to defendant's guilt. In fact, proof of guilt of murder was made beyond reasonable doubt and to an overwhelming degree. "It is axiomatic" that we may not disturb the verdict in this case. People v. Glover, 49 Ill.2d 78, 84, 273 N.E.2d 367.

No error of law appears in this record. This opinion has no precedential value. In accordance with Rule 23 of the Supreme Court of Illinois, (Ill.Rev.Stat. 1972, ch.110A, par.23), adopted effective January 31, 1972, the judgment is affirmed.

Judgment affirmed.

BURKE, J. and LYONS, J. concur.

54012



81A³ 423

| | | |
|---|---|-------------------|
| CITY OF CHICAGO, a municipal corporation, |) | |
| |) | APPEAL FROM THE |
| Plaintiff-Appellant, |) | CIRCUIT COURT |
| |) | OF COOK COUNTY. |
| vs. |) | |
| |) | HONORABLE |
| FIRST NATIONAL BANK OF SKOKIE, |) | FRANKLIN I. KRAL, |
| ET AL, |) | PRESIDING. |
| |) | |
| Defendants. |) | |

MR. JUSTICE LYONS delivered the opinion of the court:

The City of Chicago brought this action against defendants on September 26, 1963, to enforce certain provisions of the Chicago Zoning Ordinance. Among various other relief, the City sought an injunction requiring defendants to make alterations in a structure located at 7418 North Oakley Avenue, Chicago, allegedly necessary to bring the structure into compliance with applicable building and zoning ordinances. See Ill.Rev.Stat. 1961, ch.24, par.11-13-15. Following a hearing, the court entered a fine of \$2500 against the builder of the structure, denied all relief against the other defendants and enjoined the City from interfering with the present use of the property. The City has appealed.

The facts disclose that the City of Chicago issued a building permit on October 15, 1962, for the erection of an apartment building at 7418 North Oakley Avenue, Chicago. According to the plans submitted to the City in conjunction with the permit application, the building was to contain three efficiency apartments and three bedroom apartments. However, inspections made by the City after the building had been constructed revealed that it contained six bedroom apartments and was, therefore, clearly in violation of certain zoning and building ordinances. The City then brought this action to force a de-conversion of the apartments to the original terms of the building permit.

The court below determined that the building had indeed been constructed in violation of City zoning and building ordinances, but denied the City any relief in part because:

[N]o proof was offered by the plaintiff [City] to indicate that the public welfare requires a deconversion of the subject building to three bedroom apartments and three efficiency apartments as called for under the original permit. The evidence herein indicates that the zoning ordinance in its application to the within described premises would impose a real and substantial hardship on the defendants by subjecting them to the cost of re-construction, which would lessen the intrinsic value of the building with no substantial gain resulting to the general public welfare.

The trial court's finding that compliance with City ordinances would require defendants to expend the cost of converting three units and would reduce the market value of the property is supported by the evidence, but it was not the City's burden to prove that the public welfare required enforcement of the ordinance. Rather, it was the defendants' burden to overcome the presumption that enforcement was of benefit to the health, safety and welfare of the public. *City of Chicago v. Exchange National Bank* (1972), 51 Ill.2d 543, 546, 283 N.E.2d 878 (and cases cited therein). Our examination of the evidence in this case indicates that defendants wholly failed to meet this burden. Moreover, we find no evidence sufficient to create an estoppel against the City. See *City of Chicago v. Exchange National Bank* (1971), ___ Ill.App.3d ___, 273 N.E.2d 484, aff'd, *City of Chicago v. Exchange National Bank* (1972), 51 Ill.2d 543, 283 N.E.2d 878; *City of Chicago v. Handler*, No. 54269 (Ill.App., filed October 2, 1972); *City of Chicago v. Handler* (1972), ___ Ill.App.3d ___, 287 N.E.2d 31; *City of Chicago v. Jachimowski* (1972), ___ Ill.App.3d ___, 287 N.E.2d 36.

Accordingly, insofar as the judgment order appealed from purports to grant injunctive relief against enforcement by plaintiff, City of Chicago, of all applicable City ordinances,

it is reversed. The cause is remanded to the Circuit Court of Cook County with directions for the entry of judgment granting plaintiff the mandatory injunctional relief prayed in its complaint.

Judgment order reversed; cause
remanded to Circuit Court with
directions.

GOLDBERG, P.J. and BURKE, J., concur.

54390

| | | |
|---|---|-------------------|
| CITY OF CHICAGO, a Municipal Corporation, |) | |
| |) | APPEAL FROM THE |
| |) | CIRCUIT COURT |
| Plaintiff-Appellant, |) | OF COOK COUNTY. |
| |) | |
| vs. |) | |
| |) | HONORABLE |
| MICHAEL STEIGER, et al., |) | FRANKLIN I. KRAL, |
| |) | PRESIDING. |
| Defendants-Appellees. |) | |

MR. JUSTICE LYONS delivered the opinion of the court:

The City of Chicago brought this action against defendants on April 21, 1966, to enforce certain provisions of the Chicago Zoning Ordinance. Among various other relief, the City sought an injunction requiring defendants to make alterations in a structure located at 7241-45 North Claremont Avenue, Chicago, allegedly necessary to bring the structure into compliance with applicable building and zoning ordinances. See Ill.Rev.Stat. (1965), ch.24, par.11-13-15. Following a hearing, the court entered a fine of \$4,000 against the builder of the structure, dismissed the other defendants and enjoined the City from interfering with the present use of the property. The City has appealed.

The facts disclose that the City of Chicago issued a building permit on March 15, 1962, for the erection of an apartment building at 7241-45 North Claremont Avenue, Chicago. According to the plans submitted to the City in conjunction with the permit application, the building was to contain seven efficiency apartments and seven bedroom apartments. However, inspections made by the City after the building had been constructed revealed that it contained fourteen bedroom apartments and was, therefore, clearly in violation of certain zoning and building ordinances. The City then brought this action to force a deconversion of the apartments to the original terms of the building permit.

The court below determined that the building had indeed been constructed in violation of City zoning and building ordinances, but denied the City any relief because:

[N]o proof has been offered by the plaintiff [City] to indicate that the public welfare requires a deconversion of the subject premises to 7 efficiency apartments and 7 bedroom apartments as called for under the original permit. The evidence indicates that the zoning ordinance, in its application to the particular property, would impose a real and substantial hardship on the present owners by subjecting them to the cost of reconstruction, which would lessen the intrinsic value of the building with no substantial gain resulting to the general public.

The trial court's finding that compliance with City ordinances would require defendants to expend the cost of converting seven units and would reduce the market value of the property is supported by the evidence, but it was not the City's burden to prove that the public welfare required enforcement of the ordinance. Rather, it was defendants' burden to overcome the presumption that enforcement was of benefit to the health, safety and welfare of the public. *City of Chicago v. Exchange National Bank* (1972), 51 Ill.2d 543, 546, 283 N.E.2d 878 (and cases cited therein). Our examination of the evidence in this case indicates that defendants wholly failed to meet this burden. Moreover, we find no evidence sufficient to create an estoppel against the City. See *City of Chicago v. Exchange National Bank* (1971), ___ Ill.App.3d ___, 273 N.E.2d 484, aff'd, *City of Chicago v. Exchange National Bank* (1972), 51 Ill.2d 543, 283 N.E.2d 878; *City of Chicago v. Handler*, No. 54269 (Ill.App., filed Oct. 2, 1972); *City of Chicago v. Handler* (1972), ___ Ill.App.3d ___, 287 N.E.2d 31; *City of Chicago v. Jachimowski*, (1972), ___ Ill.App.3d ___, 287 N.E.2d 36.

Accordingly, insofar as the judgment order appealed from purports to grant injunctive relief against enforcement by plaintiff, City of Chicago, of all applicable City ordinances, it is reversed. The cause is remanded to the Circuit Court of

Cook County with directions for the entry of judgment granting plaintiff the mandatory injunctional relief prayed in its complaint.

Judgment order reversed;
cause remanded to Circuit
Court with directions.

GOLDBERG, P.J. and BURKE, J., concur.

71-336

8 I.A.³ 456

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, in the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable THOMAS J. MORAN, Justice
~~-----~~ Honorable WILLIAM L. GUILD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

November 22, 1972 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

FILED

IN THE

APPELLATE COURT OF ILLINOIS

NOV 22 1972

SECOND DISTRICT

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS,)

Plaintiff-Appellee,)

-vs-)

WILLIAM PERRILL,)

Defendant-Appellant,)

Appeal from the Circuit
Court of Lake County, IllinoisHon. Lloyd A. Van Deusen
Judge presiding

MR. JUSTICE GUILD delivered the opinion of the court:

The defendant was indicted for murder. After being duly admonished by the court the defendant entered a negotiated plea of guilty with a proposed sentence of 14-35 years. The court rejected the negotiated plea and suggested a sentence of 20-60 years. Thereafter, the defendant withdrew his plea of guilty and a not guilty plea was reinstated. The defendant went to trial before a jury and he then once again offered to plead guilty. The court reminded the defendant that he had been advised of his rights by the court upon his prior plea of guilty and the defendant asserted that he understood his rights and did not need to have them repeated. However, the court again advised defendant of his rights and inquired at length as to the voluntary nature of his plea of guilty. The court then accepted the negotiated plea and sentenced the defendant to 18-60 years in the penitentiary.

The Illinois Defender Project was appointed for the purpose of this appeal and has filed a motion to withdraw alleging that there are no grounds for a meritorious appeal. We have followed the dictates of Anders v. California, 386 US 738. The appeal has been considered on the basis of the record, together with counsel's motion and accompanying brief.

After being served with a motion to withdraw, the defendant filed a pro se petition asking for certain records and for the appointment of additional counsel. We specifically find that no purpose would be served by the furnishing of additional records,

and that defendant has been furnished with a complete report of proceedings. The pro se motion for additional counsel is also denied.

From our examination of the record we agree that the appeal is wholly frivolous and without merit. We agree with counsel that the indictment was sufficient and that the defendant was properly admonished on his negotiated plea. The record discloses that the victim, 15 years of age, was lured to a warehouse where the defendant, without reasonable provocation murdered him. Later, the defendant removed the victim's body from the warehouse, placed it in the trunk of his car and then drove to Wisconsin and dumped the body alongside a road. The sentence imposed is in no way excessive. Judgment of the trial court is affirmed.

Leave to withdraw as counsel granted. Pro se petition for additional counsel denied. Judgment affirmed.

AFFIRMED.

P.J.SEIDENFELD and J. MORAN Concur.



56366



| | | |
|---------------------------------|---|--------------------------------|
| WILLIAM COCHRAN, |) | |
| Plaintiff-Appellee, |) | APPEAL FROM |
| |) | |
| vs. |) | CIRCUIT COURT, |
| |) | |
| CONSUMERS COMPANY, DIVISION OF) | | COOK COUNTY. |
| VULCAN MATERIALS COMPANY, a) | | |
| corporation, |) | HON. JACQUES F. HEILINGOETTER, |
| Defendant-Appellant.) | | Presiding. |

MR. JUSTICE BURKE delivered the opinion of the court:

On June 23, 1966, William Cochran filed a complaint seeking damages for injuries sustained as a result of a motor vehicle collision.

At the conclusion of the jury trial, a verdict for plaintiff was returned in the amount of \$9,000 and the trial judge entered judgment. Defendant's post-trial motion which prayed for judgment notwithstanding the verdict or in the alternative for a new trial was denied. Defendant appeals.

On June 27, 1964, at 7:00 A.M. plaintiff drove his automobile onto the premises of the International Paper Company in Northlake, Illinois in order to pick up a box of material for his employer.

At the trial, plaintiff testified that shortly after entering International's driveway, he observed defendant's truck driven by William McMillan, approximately one hundred feet in front of plaintiff's car. Defendant's truck was loaded with stone and weighed about two and one-half tons. Plaintiff stated that when he first observed the truck it was moving very slowly and then he saw the truck's brake lights come on and the truck stop. The truck was stopped near the driveway leading to the parking lot which plaintiff wished to enter and he determined that the driveway was not wide enough to permit him to drive around the truck

and enter the parking area. Plaintiff then stopped his automobile about fifteen to twenty feet behind the truck.

Plaintiff further testified that after he waited about five minutes for the truck to move, he decided to get out of his car and "see what the hold up was." He applied his emergency brake, looked down to put his cigarette in the ash tray and reached for the door handle. Plaintiff looked up just then and saw defendant's truck rolling toward his automobile, he saw the truck two or three feet from his car, and then the back end of the truck collided with his car. The impact pushed the car back two or three feet, tore the seat loose from the floorboard of plaintiff's car and as a result plaintiff sustained the injuries of which he now complains.

On cross-examination plaintiff identified and confirmed the correctness of four photographs introduced by defendant. Three of the photos showed the position and condition of the vehicles and area immediately following the occurrence and the fourth photo depicted the damage to plaintiff's automobile. Plaintiff's car was not driveable after the collision. The right front wheel was smashed, the radiator was broken and the radiator water leaked out on the driveway.

Defendant produced three witnesses, all of whom were truck drivers employed by the defendant and present at the scene. William McMillan, the driver of the truck which collided with the plaintiff, died prior to the trial.

Defendant's first witness, John McGrath, formerly employed by defendant as a truck driver, testified that when he pulled into International's driveway he saw two of defendant's trucks parked

there. McGrath parked his truck behind the two in front of him. Subsequently two or three other trucks pulled up and parked behind him.

Mr. McGrath identified the truck which parked directly behind him as McMillan's. He stated that he knew that McMillan had applied the truck brakes because he heard the "hissing" sound made by the brakes. He did not hear the truck brakes released. Mr. McGrath further testified that the plaintiff's car then ran into the back of McMillan's truck.

The witness testified that after the occurrence the plaintiff looked tired, slurred his words, smelled of alcoholic consumption and reached in his pocket for gum. Mr. McGrath stated that he could not give an opinion as to plaintiff's sobriety.

On cross-examination, in response to a question concerning the way in which he witnessed the accident, the witness McGrath stated:

"Well, let's say I didn't witness it at all, because I--the car is so small behind the big truck I didn't even know the car hit the truck, but I know the truck behind me [McMillan's] wasn't moving."

Plaintiff then made a motion outside the presence of the jury, as follows:

"This man [McGrath] testified quite extensively on direct examination about seeing the [plaintiff's car] coming at a high rate of speed, saw it come down the street, saw it run into the back of the truck. Now he testified he didn't see it at all. Without going any further in this man's testimony, I ask that all of his testimony on direct examination be stricken."

The trial court stated that would be a matter for impeachment and denied plaintiff's motion to strike.

Mr. McGrath further testified on cross-examination that more trucks pulled up behind the McMillan truck before the

accident. He estimated that the closest truck behind McMillan's truck was approximately forty to sixty feet and that he [McGrath] was probably forty feet in front of McMillan's truck.

Defendant's next witness, Anthony Camasta, testified that just prior to the accident there were only three trucks at the scene: one driven by his brother, one by himself and McMillan's. There were no trucks parked behind McMillan.

According to Camasta McGrath was not present at the time of the accident. Camasta testified that when McMillan arrived he parked approximately ten feet behind Camasta and pulled on the brakes. He knew that McMillan applied his brakes because he heard the brakes "hissing." The witness further testified that plaintiff's car ran right into the back end of McMillan's parked truck. In reference to the plaintiff's condition after the accident, Camasta testified that the plaintiff "said something but it was slurry."

Defendant's final witness was John O'Leary, another of the defendant's drivers. He testified that as he approached the driveway of International Paper Company he put on his right turn signal and then plaintiff's car passed him on the shoulder of the road and cut in the driveway ahead of him.

According to Mr. O'Leary, there were three of defendant's trucks parked in the driveway. He saw plaintiff's brake lights go on and then out and then plaintiff ran into the back of McMillan's truck. He observed from a distance of a "couple hundred feet" away that at the time plaintiff hit the truck, the truck was standing still.

The witness further testified that plaintiff did not have to pass any trucks before striking McMillan's truck since there were

no other trucks between plaintiff and McMillan's vehicle. After the accident, O'Leary saw plaintiff put gum in his mouth.

Defendant argues that the trial judge should have granted defendant's motion for judgment notwithstanding the verdict. We do not agree.

A judgment notwithstanding the verdict should be entered only in a case in which all of the evidence viewed in its aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand. *Pedrick v. Peoria and Eastern Railroad Company*, 37 Ill.2d 494, 229 N.E.2d 504.

The testimony in this case was conflicting as to the essential facts. Plaintiff testified that he pulled his car into International's driveway and came to a stop about fifteen to twenty feet behind defendant's truck. Plaintiff then applied his emergency brake, looked down to put his cigarette in the car ashtray and looked up to see defendant's truck only a few feet away and plaintiff could do nothing but watch the inevitable collision.

Defendant offered testimony of witnesses, who while differing considerably in their versions of the occurrence, stated that they saw McMillan's truck stop on the driveway, that they heard McMillan apply his brakes, that they did not hear McMillan release his brakes and that they saw plaintiff drive his car into the back end of defendant's truck. The witnesses also described plaintiff, following the accident, as having the symptoms of intoxication and stated that his speech was "slurry."

In the face of conflicting evidence, the jury had to decide which testimony to believe and which to discredit. The jury in this case chose to believe the plaintiff. The testimony of the

three defense witnesses was inconsistent in material respects. Witnesses McGrath and Camasta each stated that it was his truck that was the one directly in front of McMillan's. According to Camasta only McMillan, himself and his brother were parked on the driveway. If Camasta was correct, then McGrath was not even present. Assuming that McGrath was present, his testimony was completely contradicted. On direct examination he flatly stated that he saw plaintiff's vehicle crash into defendant's truck. But on cross-examination he admitted that he could not see plaintiff's car at the time of the accident. McGrath testified that other trucks were parked behind McMillan but both O'Leary and Camasta denied the existence of such trucks.

The sole thread of consistency in the testimony of defendant's witnesses was that they observed plaintiff put gum into his mouth, that his speech was "slurry" and they heard the "hissing" sound allegedly indicating McMillan applied his brakes. Witnesses McGrath and O'Leary remembered the "gum" and McGrath and Camasta remembered hearing the brakes "hissing" and heard the plaintiff's "slurred" speech.

The jury might well have thought it curious that while defendant's witnesses could remember minute details of the occurrence and of plaintiff's alleged inebriated condition, they could not consistently recall where the trucks were located or how the mishap occurred.

Defendant however states that he is not urging the court to pass on the issue of the credibility of the witnesses which he concedes in this case was solely the function of the triers of fact. Defendant states that his position is better stated by the court in *Miller v. Pillsbury Co.*, 56 Ill.App.2d 403, 409, 206 N.E.2d 272, 275, aff'd 33 Ill.2d 514, 211 N.E.2d 733:

"Credibility of evidence is to be distinguished from credibility of witnesses, although the distinction is sometimes more apparent than real, though not in this case. While the credibility (or incredibility) of a witness is almost always a question for the trier to determine, evidence, sometimes even expert testimony, may be so incredible, so in conflict with the immutables, that it is incompetent and hence inadmissible. Witnesses, no matter how expert, will not, for example, be permitted to repeal the law of gravity."

In addition, defendant, relying principally on the photographic exhibits, invokes the "physical impossibility" rule and maintains that regardless of the credibility of the witnesses, the physical evidence precludes the conclusion that defendant's truck backed into plaintiff's vehicle and establishes that the mishap could only happen by plaintiff's collision with the truck.

We disagree. The physical evidence in this case does not compel our acceptance of defendant's version. Moreover, the physical evidence adduced by plaintiff does not violate the "laws of science" and is not "so incredible" or "so in conflict with the immutables" that it must be rejected. *Miller v. Pillsbury Co.*

While a trier of fact must reject testimony of that which is physically impossible, inherently improbable or contrary to the common experience of mankind, the testimony in the instant case does not justify the application of that rule in defendant's favor. The conflict in the evidence in this case presented a question to be resolved by the jury. Where so much depends upon the credibility of witnesses and upon the opportunity of the witnesses to observe the facts and where the established facts leave room for different conclusions to be drawn by reasonable men, this court will not substitute its judgment upon the facts

for that of the jury. (See Seybold v. Zimmerman, 294 Ill.App. 138, 13 N.E.2d 675; Simpson v. Marks, 349 Ill.App. 527, 111 N.E. 2d 370.)

Considering all of the evidence in its aspect most favorable to the plaintiff, we cannot say that the evidence so overwhelmingly favors the defendant that no contrary verdict based on that evidence could ever stand. Accordingly, the trial court was correct in denying defendant's motion for judgment notwithstanding the verdict.

Defendant argues alternatively, that the verdict is against the manifest weight of the evidence and the result of passion and prejudice and therefore he should be given a new trial. We do not agree.

Specifically, defendant complains that plaintiff's counsel, over objection, asked the witness McGrath on cross-examination whether, at any time after the accident, plaintiff was arrested for being drunk or intoxicated. Defendant's counsel immediately objected to the question, the trial judge sustained his objection and plaintiff's counsel did not pursue this matter.

The record does not substantiate defendant's contention that "plaintiff's counsel, over objection, sought to show that plaintiff was not arrested for drunken driving . . ." In view of the fact that no response to the question was given, once the objection was sustained, any error in asking the question was cured. (See Cavitt v. Faulkner, 74 Ill.App.2d 196, 219 N.E.2d 363.)

Defendant, however, argues that plaintiff, by eliciting the objection of defense counsel to his question to witness McGrath concerning whether the plaintiff was arrested after the mishap for drunken driving, suggested to the jury that plaintiff had

material and valuable evidence to give but was being denied an opportunity by defendant's technical objection. He argues that this has been held to constitute reversible error on numerous occasions. *Crutchfield v. Meyer*, 414 Ill. 210, 111 N.E.2d 142; *Jacobson v. National Dairy Products Corporation*, 32 Ill.App.2d 37, 176 N.E.2d 551.

The *Crutchfield* and *Jacobson* cases, as well as the other authorities cited by defendant, are not apposite here. Those cases hold that it may be reversible error for counsel to persist in an objectionable line of questioning after an adverse ruling by the court, or to suggest by innuendo that opposing counsel's objections were precluding the party from introducing important proof. The present case is not similar to the cases cited by defendant. In the instant case, plaintiff's counsel did not pursue the matter after the court sustained defendant's objection and plaintiff's counsel made no further reference to it in his closing arguments.

Finally, defendant contends that certain remarks made by plaintiff's counsel in his closing argument constituted a deliberate appeal to passion and prejudice.

It is a fundamental rule of trial procedure that in arguing a case to a jury counsel is permitted wide latitude in urging all reasonable inferences and conclusions which may be drawn from the evidence in the case. *Tuskey v. Callos*, 112 Ill.App.2d 213, 250 N.E.2d 524. Counsel specifically has the right "to present to the jury, in argument, the inconsistencies and contradictions of witnesses, to comment on their manner of testifying, and anything else which will show that they are mistaken or unworthy of belief, and to denounce the witness as unreliable or untruthful." *Chicago Union Traction Co. v. O'Brien*, 219 Ill. 303, 76 N.E. 341.

While some of plaintiff counsel's remarks in his closing argument were not judiciously chosen, we cannot say that when they are taken in the context of the entire transcript they constituted a deliberate appeal to passion and prejudice.

We conclude that the verdict is not against the manifest weight of the evidence nor the result of passion and prejudice and that the trial court was correct in denying the motion for a new trial.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG, P.J., and ADESKO, J., concur.

8 I.A.³ 537

72-84

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable MEL ABRAHAMSON, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

November 27, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED

NOV 27 1972

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
FLOYD WESLEY a/k/a WESLEY FLOYD)
a/k/a FLOYD E. WESLEY,)
)
Defendant-Appellant.)

Appeal from the Circuit
Court of the 19th Judicial
Circuit, Lake County,
Illinois.

MR. JUSTICE THOMAS J. MORAN delivered the opinion of the court:

A five count indictment charged the defendant with burglary, robbery and aggravated battery. Under plea negotiations, he entered a plea of guilty to count three (burglary) and was sentenced to a term of 1 to 5 years in the penitentiary.

Pending appeal, the defendant's attorney has filed a motion to withdraw as counsel claiming the appeal to be frivolous.

We have followed the dictates of Anders v. California, 386 U.S. 738. The appeal has been considered on the basis of a review of the record and counsel's motion with accompanying brief. The record discloses no error.

Therefore, the motion to withdraw is allowed and the judgment affirmed.

Motion allowed; Judgment affirmed.

SEIDENFELD, P.J. and ABRAHAMSON, J. - Concur

8 I.A.³ 540

72-26

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable MEL ABRAHAMSON, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

November 29, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

FILED

No. 72-26

NOV 29 1972

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

| | | |
|----------------------------------|---|--------------------------|
| PEOPLE OF THE STATE OF ILLINOIS, |) | |
| |) | |
| Plaintiff-Appellee, |) | |
| |) | Appeal from the Circuit |
| v. |) | Court for the 19th Judi- |
| |) | cial Circuit, Lake |
| JOSEPH SANDIFOR, a/k/a JOSEPH |) | County, Illinois |
| BURKS, |) | |
| |) | |
| Defendant-Appellant. |) | |

MR. PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

Joseph Sandifor, a/k/a Joseph Burks, the defendant, was convicted of burglary in a bench trial. He has appealed his conviction and the sentence imposed of 4 to 8 years in the penitentiary.

Appointed counsel from the Illinois Defender Project has petitioned for leave to withdraw as counsel by filing a motion supported by a brief pursuant to Anders v. California (1967), 18 L.Ed.2d 493, 498. Defendant has filed a letter in response to our order granting leave to file any additional matters in his behalf. We review on the basis of the record, together with counsel's motion and brief, and the matters raised by the defendant.

We have considered these issues: whether the defendant was competent to stand trial; whether the court erred in denying defendant's motion for discovery of statements of witnesses

prior to trial; whether the jury waiver was proper; whether defendant was afforded a speedy trial; whether defendant was proved guilty beyond a reasonable doubt, and whether the sentence imposed was excessive.

The record which included the testimony of two qualified physicians, clearly shows that defendant was able to understand the nature and purpose of the proceedings against him and able to assist in his defense. He was therefore competent to stand trial. Ill.Rev.Stat. 1971, ch.38,par.104-1.

The memorandums of the oral statements of witnesses, found in the police reports, were made available to the defendant's counsel at trial, for impeachment purposes. Since the case was tried in August of 1971, before the effective date of the new discovery rules, the court did not err under the then prevailing law in denying discovery of these items prior to trial. People v. Allen (1972), 50 Ill.2d 280, 286; People v. French (1965), 61 Ill.App. 2d 439, 444-445.

The record also shows a knowing and understanding waiver of the right of jury trial. Defendant was fully admonished. It is clear from the record that defendant was able to understand and did understand the waiver. This issue is also without merit. People v. Alexander (1970), 45 Ill.2d 53.

Defendant was not denied a speedy trial. He was indicted October 31, 1967; represented by the Public Defender, he entered a plea of not guilty on November 8, 1967, then withdrew the plea and entered a plea of guilty on December 20, 1967; he was released on bond on January 10, 1968 pending a probation hearing; on January 24, 1968, he moved to withdraw his plea of guilty and the court vacated the judgment entered on the plea; on February 13, 1968, a competency hearing was ordered and the court found the defendant competent; when the cause reached the trial date on March 14, 1968, defendant did not appear and his bond was

forfeited. A capias was issued for defendant's arrest on May 6, 1968. Defendant fled the jurisdiction and was arrested shortly before he appeared in court on June 29, 1971. The cause was heard on August 16, 1971. On this record it appears that the defendant was tried within four months of his arrest under the capias issued instanter in 1968. Any delay in the trial was caused by the action of the defendant which precluded him from invoking Ill.Rev.Stat. 1967, ch.38, par.103-5. People v. Bagato (1963), 27 Ill.2d 165, 169; People v. Fosdick (1967), 36 Ill.2d 524.

The record clearly shows proof of guilt beyond a reasonable doubt. Defendant was found in the building, perched above a store cooler. A cash register tape which had been with the money taken from the store was found in his pocket. The court was not required to believe his testimony that he was there innocently. The court's finding was not against the manifest weight of the evidence. See People v. Ward (1968), 103 Ill.App.2d 402, 408.

On the whole record and in the light of defendant's prior convictions there is no merit to the claim that sentence is excessive.

The motion of the defendant for leave to withdraw is granted. The judgment is affirmed.

Affirmed.

ABRAHAMSON, J. and MORAN, THOMAS J., J. concur.



| | | |
|----------------------------------|---|------------------------|
| PEOPLE OF THE STATE OF ILLINOIS, |) | APPEAL FROM |
| Plaintiff-Appellee, |) | |
| |) | CIRCUIT COURT, |
| vs. |) | |
| |) | COOK COUNTY. |
| MAJOR BROWN a/k/a JOHN |) | |
| WINFIELD BROWN, |) | Hon. Kenneth R. Wendt, |
| Defendant-Appellant. |) | Presiding. |

MR. JUSTICE BURKE delivered the opinion of the court:

The defendant, Major Brown, also known as John Winfield Brown, was indicted for the crime of burglary (Ill.Rev.Stat., 1967, ch. 38, par. 19-1). At a bench trial the defendant was found guilty as charged and sentenced to four years probation, the first year to be served in Cook County Jail. The defendant has appealed on the ground that he was not proved guilty of burglary beyond a reasonable doubt.

The facts in the case are as follows: On July 13, 1969, James Sutton resided with his family in a third floor apartment at 4316 S. Lake Park Avenue, Chicago. The third floor contained another apartment, occupied by Louise Trice and her children. The two apartments faced a common back porch. On the morning of July 13, 1969, Sutton left his apartment in proper order and gave no one permission to enter in his absence. When he returned to his apartment, he found it had been ransacked, some of his possessions had been stacked just inside the front door, and his rear window had been broken.

Mrs. Trice testified that on July 13, 1969, the defendant's nephew had come to her apartment to talk to her daughter Carolyn. After he left, Mrs. Trice looked out her front window and saw the defendant (whom she knew), his nephew and another man going toward the back porch of her building. When she heard noise and glass breaking, she went to the rear window and told Carolyn to call the police. Mrs. Trice waited, then called the police her-

self. When the police arrived, she went with them to Sutton's apartment and saw the defendant and his nephew, both of whom the police apprehended inside Sutton's apartment. A pile of Sutton's belongings was near the front door.

Two Chicago policemen testified at the trial. Officer Henderson testified that he and Officer Scalise responded to Mrs. Trice's call. Officer Henderson went up the rear stairs at 4316 S. Lake Park Avenue and apprehended the defendant's nephew under a bed in Sutton's apartment. Officer Scalise testified that he went up the front stairs and met the defendant leaving Sutton's apartment by the front door. He also testified that a short distance from the defendant was a pile of Sutton's belongings.

The defendant's nephew testified that he, his friend Pike and Carolyn Trice burglarized Sutton's apartment and that Pike left the apartment during the burglary. The nephew said that when he saw his uncle coming up the front stairs to Sutton's apartment, he ran and hid under a bed. He denied stacking anything near the front door. He added that his uncle never entered the apartment.

The defendant testified that he went to the apartment only to retrieve his nephew, having been told by Pike of his nephew's whereabouts. The defendant stated that he never entered the apartment but was taken into it by the police.

Admittedly, a burglary took place. The question is whether there is a reasonable doubt that Major Brown participated in the crime. His presence at the scene is unchallenged. And it is conceded in the defendant's brief that he was found by the police inside Sutton's apartment. The only issue involved in this appeal is whether the defendant's intent to commit theft at the Sutton apartment was proved beyond a reasonable doubt.

In a case similar to this one, two men were seen walking

toward the rear of an unoccupied house. A neighbor alerted the police who discovered the defendant under a pile of rugs inside the house. He was convicted of burglary, though nothing had been taken. The Appellate Court in *People v. Rossi*, 112 Ill.App. 2d 208, 211-212, 250 N.E.2d 528, 529-30, answering the defendant's argument that the requisite intent had not been proven beyond a reasonable doubt stated:

"There is no disagreement as to the legal principles which apply. Specific intent to steal must exist and be measured at the time of unauthorized entry into the dwelling of another, and the State has the burden of proving the necessary intent. [Citations] Since a person's state of mind is not subject to direct proof, ordinarily intent must be proved circumstantially by inferences drawn from conduct. In the absence of inconsistent circumstances, proof of unlawful entry into a building which contains personal property that could be the subject of larceny gives rise to an inference that will sustain a conviction of burglary. The inference is grounded in human experience which justifies the assumption that the unlawful entry was not purposeless, and, in the absence of other proof, indicates theft as the most likely purpose. [Citations]."

Although the defendant in *Rossi* could not give a reasonable explanation of his presence in the house, and the defendant in this case did present an explanation, the trial court was not obligated to believe the defendant or the supporting witness, his nephew. The defendant's denial that he was at the scene before the crime is in conflict with the testimony of Mrs. Trice. The defendant's implication of Carolyn Trice was countered by Mrs. Trice and by Officer Henderson, who observed no one leaving Sutton's apartment by the rear door. These conflicts raise questions of the credibility of witnesses, which are left to the trial court. The rule is well-stated in *People v. McCombs*, 94 Ill.App.2d 308,313, 236 N.E.2d 569, 571:

"It is axiomatic that it is the province of the trial judge hearing the case without a jury, to determine the credibility of the witnesses and the weight to be given

to their testimony, and his judgment will not be disturbed unless manifestly contrary to the weight of the evidence."

The defendant in this case was apprehended in a ransacked apartment with his nephew. He had no authority to be there. He had been seen prior to the arrest in front of the building, walking toward the rear, where forced entry was made. He attempted to leave the apartment by the front door when police officers were ascending the stairs. The apartment resident's belongings were stacked near the defendant. His explanation of his presence in Sutton's apartment was but one factor to be considered by the trial judge in reaching his verdict. It is not such "other proof" as would, under Rossi, negate the inference of felonious intent.

The cases cited by the defendant in support of his contention that he did not intend to participate in the burglary are distinguishable from the instant case. In both *People v. McCombs*, 94 Ill.App.2d 308, 236 N.E.2d 569, and *People v. Perry*, ___ Ill. App.2d ___, 272 N.E.2d 766, burglary convictions were reversed on appeal since the only evidence pointing to burglary was the unauthorized entry of dwellings by the defendants. That is not the case before us.

Since there exists no reasonable doubt as to the defendant's guilt, the judgment is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG, P.J., and LYONS, J., concur.

57122



OSBORN FORTSON) APPEAL FROM
Defendant-Appellant,)
) CIRCUIT COURT,
vs.)
) COOK COUNTY.
PEOPLE OF THE STATE OF ILLINOIS,)
Plaintiff-Appellee.) HON. JACQUES F. HEILINGOETTER,
Presiding.

MR. JUSTICE BURKE delivered the opinion of the court:

The defendant, Osborn Fortson, appeals from the dismissal of his post-conviction petition, filed under the provisions of the Post-Conviction Hearing Act (Ill.Rev.Stat., 1969, ch.38, par. 122-1 et seq.). The defendant was indicted for the crimes of rape, deviate sexual assault and armed robbery. A jury returned verdicts of guilty on each charge. The court then imposed sentences of 20 to 40 years for rape, 10 to 14 years for deviate sexual assault and 10 to 20 years for armed robbery, all sentences to run concurrently.

The defendant appealed his conviction to this court, where the judgment of the trial court was affirmed (*People v. Fortson*, 110 Ill.App.2d 206, 249 N.E.2d 260). The defendant then filed pro se a post-conviction petition. The Cook County State's Attorney filed a motion to dismiss, based on res judicata. Shortly thereafter, an amended post-conviction petition was filed by the defendant's private counsel. The motion to dismiss was renewed and, after a hearing, was granted by the trial court.

The defendant's appointed counsel has moved for leave to withdraw from the case. The motion is supported by a brief pursuant to *Anders v. California*, 386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396. In the brief counsel states that a conscientious examination of the record reveals that any appeal would be

frivolous and wholly without merit. A copy of the motion and brief were mailed to the defendant on June 30, 1972, and he was given until September 27, 1972, to submit his comments to this court. No reply has been received.

The present appeal is limited to the dismissal of the post-conviction petition, which challenged the propriety of the concurrent sentences. As pointed out in counsel's brief, this court has already considered the defendant's argument that the sentences were excessive. Hence, as noted by the trial court at the post-conviction petition hearing, our prior decision (*People v. Fortson*, 110 Ill.App.2d 206, 249 N.E.2d 260) is res judicata as to this issue. (*People v. Ward*, 48 Ill.2d 117, 268 N.E.2d 692.) Further, the issue was not properly raised in the post-conviction petition, since a sentence which is within the applicable statutory limits for a crime does not present the constitutional issue of cruel and unusual punishment. *People v. Dudley*, 46 Ill.2d 305, 263 N.E.2d 1.

Since we conclude from the brief and from an independent examination of the record in this cause that an appeal would raise no legal points arguable on the merits, we grant counsel's motion to withdraw and affirm the judgment.

JUDGMENT AFFIRMED.

GOLDBERG, P.J., and LYONS, J., concur.



81A³ 646

No. 55947

| | | |
|------------------------|---|----------------------|
| CLARENCE W. PENSCHARD, |) | APPEAL FROM THE |
| |) | CIRCUIT COURT OF |
| Plaintiff-Appellee, |) | COOK COUNTY. |
| |) | |
| vs. |) | |
| |) | |
| HARVEY J. POWERS, |) | HONORABLE |
| |) | ROBERT E. McAULIFFE, |
| Defendant-Appellant. |) | PRESIDING. |

MR. PRESIDING JUSTICE MCGLOON delivered the opinion of the court:

This is an appeal from a judgment of the circuit court sitting without a jury finding defendant guilty of fraud on each count of a two-count complaint. Defendant appeals alleging as grounds for reversal the following: Fraud cannot lie when the plaintiff unreasonably relies upon the alleged fraudulent representation of the defendant; defendant was not proven guilty by a preponderance of the evidence.

We affirm.

The facts, as are relevant to the issues raised on appeal, are as follows:

On January 10, 1964, plaintiff and defendant, having been introduced by a mutual acquaintance, met at plaintiff's house in Norridge, Illinois, where defendant stated to plaintiff that one Fred Riley owned 6000 shares of stock of the General Mortgage and Finance Corporation and that he could get more shares. He further stated that although plaintiff could buy Riley's shares at \$2.50 per share, the stock would appreciate to \$16 a share within 90 days. Defendant further stated that he could get a promissory note from Riley to the plaintiff which would show the transaction as a loan should the stock depreciate in value. Plaintiff agreed to purchase the 6000 shares and consequently, on January 27, 1964, gave defendant \$10,000 in cash (which defendant insisted upon) as partial payment for the stock. He received a receipt for these funds signed by both defendant and Riley. On February 18, 1964, plaintiff paid to defendant an additional \$5000 in cash. This represented the balance due on the purchase of the initial shares of stock.

On March 28, 1964, plaintiff, defendant and one Delgo Fidamzi met at defendant's office. Defendant offered for sale 6000 additional shares of General Mortgage and Finance Corporation at a price of \$20,000. Plaintiff and Fidamzi agreed to purchase the shares and plaintiff paid defendant \$10,000 in cash for his portion of the purchase. Defendant refused to give plaintiff a receipt for this money claiming that he would give plaintiff instead the shares of stock. Plaintiff allegedly received neither a receipt nor shares of stock for this \$10,000.

In April, plaintiff, defendant, Mr. Fidamzi and Mr. Vincent met at defendant's office. Defendant stated that he had a chance to buy the Bloomington Small Investment Corporation at a good price and only needed some money to "bind the deal." Vincent, purportedly a friend of defendant, agreed to invest \$13,000 and gave defendant a check for \$13,000. Defendant then asked plaintiff for a loan of \$4,000 to cover Vincent's check until it cleared. Plaintiff counted out the money to defendant. Fidamzi picked up the cash, put it in his pocket and exited, defendant following behind him.

Vincent later gave plaintiff two checks made out for \$100 and \$900 respectively. Although both checks did not clear, defendant covered the check for \$100 so that plaintiff's net loss on the April transaction was reduced to \$3900. The fact that Vincent's checks did not clear should have come as no surprise to defendant, since defendant testified that he had a " * * * bunch of his bad checks in my file. These checks were for gasoline, food, mortgage payments, fees, other lawyers * * * everything in this world a man could write a check for."

In June of 1964 the General Mortgage and Finance Corporation shares went up to \$16 per share. Plaintiff therefore authorized his broker to sell the 6000 shares he had received from Riley under the January 10 transaction. When the stock could not be sold because it had not been properly transferred to plaintiff, plaintiff confronted Riley and demanded a proper transfer. Riley refused to

comply, claiming that defendant had never given him the money for the stock.

In July, while at a restaurant in River Forest, defendant offered to plaintiff \$40,500 if plaintiff refrained from filing a complaint against defendant and Vincent. Plaintiff refused.

In August defendant offered plaintiff \$53,000 if plaintiff would sign a handwritten document releasing defendant from all liability on the transactions. Plaintiff again refused. When the document was admitted into evidence, defendant admitted offering plaintiff \$53,000 but claimed it was only offered because he felt sorry for the plaintiff who had lost his money.

A judge of the circuit court, sitting without a jury, found that the March and April transactions were fraudulent and entered judgment for the plaintiff in the amount of \$13,900.

We will first consider defendant's argument that he was not found guilty of fraud by a preponderance of the evidence. Our examination of the record leads us to believe that more than ample evidence was present on the issue of fraud. It is the province of the trial court to make determinations as to the credibility of witnesses and the weight to be afforded their testimony, and barring a trial record clearly contrary to the trial court's findings, this court will not upset its judgments. See Kane v. Yellow Cab Co. (1967), 84 Ill.App.2d 287, 228 N.E.2d 194.

We must next consider defendant's argument to this court that fraud cannot here lie because plaintiff's reliance upon the alleged fraudulent statements of defendant was unreasonable. Some facts which defendant feels are pertinent to demonstrate that plaintiff unreasonably relied upon defendant's misrepresentations are: that plaintiff did not know defendant well yet proceeded to conduct business with him; that some of the transactions were not witnessed by a writing; that plaintiff failed to investigate Riley; that although plaintiff had received neither stock nor a cash receipt on the March transaction, he still extended credit to defendant in the April transaction.

The classic elements of fraud were set out by our Supreme Court in the case of Bennett v. Hodge (1940), 374 Ill. 326, 29 N.E. 2d 524, where the Court stated at page 331, 332:

It is agreed all of the following elements must be proved in an action based on fraud: (1) The misrepresentation must be of a statement of fact; (2) it must be made for the purpose of influencing the other party to act; (3) it must be untrue; (4) the party making the statement must know or believe it to be untrue; (5) the person to whom it is made must believe and rely on the statement; (6) the statement must be material.

The party's reliance upon the alleged fraudulent statement must be a reasonable one. (Thompson v. Miner (1940), 303 Ill. App. 335, 25 N.E.2d 137.) Thus, courts have found reliance unreasonable in such instances as where the defendant had represented that eyeglasses made from his special glass would adapt themselves to the eye indefinitely (H. Hirschberg Optical Co. v. Michaelson (1901), 95 N.W. 461 (Sup. Ct. Neb.)), or where a plaintiff did not ascertain whether or not a street transversed property he was to purchase in his town. Bundesen v. Lewis (1938), 368 Ill. 623, 15 N.E.2d 520.

However, the rule requiring plaintiff's reliance to be reasonable is not inflexible, for a party to a transaction will not be allowed to impute negligence to another as against his own deliberate fraud. Pustelniak v. Vilimas (1933), 352 Ill. 270, 185 N.E. 611; Peterson v. Yacktmann (1960), 25 Ill.App.2d 208, 166 N.E.2d 452.

In the case at bar, plaintiff's reliance was reasonable. Although he had some prior business experience, plaintiff was dealing with an attorney at law and could reasonably have relied upon defendant's affirmative statements of fact. The fact that plaintiff did not know defendant well is a fact meaningless in itself; this was a business transaction, not a social endeavor, and to assume that a licensed attorney conducting business is acting in a forthright manner is not unreasonable. Neither are we put off by the fact that plaintiff lent his resources to the April transaction

having received neither a receipt nor stock certificates for funds payed over to defendant as part of the March transaction. The time elapsed between the two transactions (less than one month) was not so great that plaintiff should have known that, having received nothing from the March transaction, he was being victimized by defendant.

Furthermore, the record supports plaintiff's allegation that defendant's actions were knowingly calculated to defraud plaintiff. This being so, defendant is in a singularly bad position to impute negligence to plaintiff predicated upon plaintiff's somewhat scanty business background.

This court, having found defendant's arguments to be without merit, affirms the judgment of the circuit court.

Judgment affirmed.

DEMPSEY and McNAMARA, JJ., concur.

Nov 9, '72

3rd Div.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 6th day of December, the year of our Lord one thousand nine hundred and seventy-one, within and for the Second District of Illinois:

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable THOMAS J. MORAN, Justice
Honorable MEL ABRAHAMSON, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

November 17, 1972 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

Nov 9, '72

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED

NOV 17 1972

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

| | | |
|----------------------------------|---|----------------------------|
| PEOPLE OF THE STATE OF ILLINOIS, |) | |
| |) | |
| Respondent-Appellee, |) | Appeal from the Circuit |
| |) | Court of the 17th Judicial |
| v. |) | Circuit, Winnebago County, |
| |) | Illinois. |
| ROBERT REED, |) | |
| |) | |
| Petitioner-Appellant. |) | |

MR. JUSTICE THOMAS J. MORAN delivered the opinion of the court:

Defendant, after an evidentiary hearing, appeals from an order denying his petition for relief under the Post Conviction Hearing Act.

As grounds for reversal, he contends that his plea of guilty to indecent liberties with a child was not knowingly and voluntarily entered because (a) it was induced by the false promises and threats of his court appointed attorney, and (b) it was the result of ineffective assistance of counsel, that the police miscommunicated the Miranda warning concerning his right to counsel during interrogation, confusing it with the right to counsel at trial, and that they ignored defendant's repeated queries about getting an attorney.

Defendant, (originally charged with rape, aggravated kidnapping, and indecent liberties with a child) was arrested on August 4, 1969. According to the testimony of

the two arresting officers, defendant was taken to the detective bureau where a "rights card" containing the Miranda warnings was read to him. Asserting that he understood his rights and was willing to talk with the officers, defendant related that on the evening of the alleged offense, he had been out drinking with his "common law" wife and that upon his return, he drove the babysitter (the victim) and her girlfriend home. After volunteering this information, defendant refused to discuss the matter further until he had consulted an attorney. The officers ceased questioning and defendant was taken to a cell.

The following morning, defendant was returned to the detective bureau and, after again being apprised of his rights, he was interviewed by the arresting officers. Once more defendant made statements to the effect that he had been out drinking on the night of the alleged occurrence and later took the babysitter home. Defendant then asked how he could obtain counsel and was informed that he could telephone an attorney or have the court appoint one. He was thereupon returned to his cell. According to the arresting officers, defendant did not ask to use the telephone or to have an attorney appointed.

Thereafter, defendant appeared in court and the public defender was appointed to represent him. A plea of not guilty was entered and the cause set for trial for October 20. On that date, however, the public defender was allowed to withdraw as the attorney of record because defendant had expressed dissatisfaction with his services. Other counsel was appointed. On October 22, defendant pled guilty to the charge of indecent liberties.

Defendant's version of the relevant occurrences differs in several respects from the evidence heretofore related. Defendant testified that he was not given the Miranda warnings before being questioned by the police on August 4 and that, though he requested an attorney on both days he was questioned, he was told he would not be given one. He further testified that his trial counsel informed him that merely taking the thirteen year old sitter home constituted the crime of indecent liberties and promised him that he would be granted probation if he pleaded guilty whereas, if he went to trial, the woman with whom he had been living would be prosecuted for adultery and her children taken from her.

Defendant argues that his plea was coerced by the false promises and threats of his court appointed counsel and therefore not knowingly and voluntarily entered.

Defendant's testimony was partially corroborated by one McCoy Ford, a County Jail inmate, who testified that he had overheard a conversation between defendant and his attorney wherein counsel promised defendant he would receive probation if he pled guilty. The attorney emphatically denied these promises and threats during his testimony at the hearing. The Assistant State's Attorney who had been on the case also testified and denied having communicated to defense counsel that the woman would be prosecuted if defendant failed to enter a plea.

In concluding that no false promises or threats had been made, the court pointed out that the testimony of Ford had been impeached in that he demonstrated some confusion as to when the conversation had taken place, was not credible in explaining how he had managed to overhear the pertinent parts of defendant's conversation with his lawyer, and that evidence showing visitors allowed into the jail on particular days did not coincide with Ford's testimony. The court further noted that there was nothing in the record to cause it to disbelieve the testimony of defense counsel and the Assistant State's Attorney.

The law is well settled that whether testimony is to be believed is a decision for the trial judge and his determination will not be upset on review unless it is shown that his decision was manifestly erroneous. (People v. Watson, 50 Ill. 2d 234, 236 (1972); People v. Downen, 45 Ill. 2d 197, 201 (1970); People v. Logue, 45 Ill. 2d 170, 174 (1970).) Under the evidence recounted, it is obvious that resolving the question of whether false promises and threats had been made, depended upon which testimony was believed. We cannot say that the trial court's determination was manifestly erroneous.

Defendant contends that he was denied effective assistance of counsel when his court appointed attorney imparted misinformation which, in conjunction with Miranda violations, made his plea less than knowing and voluntary. He asserts that because he

was informed by counsel that merely taking a thirteen year old girl home constituted the crime of indecent liberties, and since he had, during improper interrogation, admitted to the police that he had taken the babysitter home, he believed he had already confessed the crime. He argues that this combination of factors compelled him to plead guilty.

At the hearing, defendant's attorney denied that he had represented to defendant that the mere act of taking the girl home constituted an offense, that defendant had, in fact, revealed to him that he had had sexual relations with the girl and, on the basis of this knowledge, defendant was counselled to enter a plea of guilty. While on the witness stand, defendant himself admitted having told his attorney that he had had intercourse with the girl.

Defendant's claim of misinformation on the substance of the crime is a factual issue, the resolution of which depends upon what evidence is believed. Again, it cannot be said that the trial court's determination was manifestly erroneous. As the trial court noted, there is no showing of incompetency in the fact that the attorney advised a plea of guilty after defendant admitted having had sexual relations with the girl.

Defendant contends that his constitutional rights were violated when the police "miscommunicated" the Miranda warning regarding his right to have an attorney present during questioning and confused that right with his right to counsel at trial; that the police continued interrogation, ignoring defendant's queries about counsel.

Having already found that defendant's plea of guilty was voluntary, any question regarding the giving of the Miranda warning and the propriety of the interrogation is without merit. (See, People v. Harper, 43 Ill. 2d 368, 372-373 (1969).) It has frequently been held that a voluntary plea of guilty waives all errors and irregularities, including questions of constitutional rights that are not jurisdictional. People v. Phelps,



51 Ill. 2d 35, 38 (1972); People v. Stanley, 50 Ill. 2d 320, 321-322 (1972); People v. Ford, 47 Ill. 2d 409, 412 (1971); People v. Page, 38 Ill. 2d 611, 613 (1967), cert. den. 392 U.S. 941 (1968).

For the reasons given, the trial court's denial of the petition for post-conviction relief is affirmed.

Judgment affirmed.

SEIDENFELD, P.J. and ABRAHAMSON, J. - Concur

STATE OF ILLINOIS

8 I.A.³ 690

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 22nd day
of November A. D. 1972, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

| | | |
|----------------------------------|---|---------------|
| People of the State of Illinois, |) | |
| |) | |
| Plaintiff-Appellee |) | Appeal from |
| |) | Circuit Court |
| vs. |) | Macon County |
| |) | |
| Harold Junior Bradford, |) | |
| |) | |
| Defendant-Appellant |) | |

MR. JUSTICE SMITH delivered the opinion of the court:

For a second time, the defendant appeals from a judgment of the Macon County circuit court sentencing him for a period of 30 to 60 years on a plea of guilty to the charge of murder and charges that the sentence is excessive. On its first appearance in this court, we affirmed the conviction and remanded the case to the trial court for the purpose of proceedings to provide an evidentiary backdrop for the sentence imposed. (1 Ill. App.3d 38, 272 N.E.2d 259.) In the first case, there was none in the record before us. The defendant now says that on the

evidence in the record now before us, the sentence is excessive and the evidence supporting it was never made a part of the record. Neither position is well taken.

On remand, the presentence report of the probation officer was filed with proof that a copy had been served on the defendant. The case was continued for several days and then called for a hearing in aggravation and mitigation and sentencing. Both counsel concurred in this procedure in the presence of the defendant. Attached to that report was a psychiatric report of Dr. Milton C. Baumann made prior to the first sentence upon which the trial court made a finding in the record that the defendant was a dull individual with "latent hostility and psychosexual preoccupation and that he is a manipulator and thus the chances of rehabilitation are poor and the risk of future danger to society is great". The court further found from the presentence report that the decedent was "murdered in cold blood while returning from church in the course - murdered in the course of a planned armed robbery", that the defendant was one of the perpetrators of the planned armed robbery, that he was a gunman in this murder and that he without mercy fired three or four shots into the victim. Such findings are supported by facts stated in the presentence report and the letter of the psychiatrist. The record suggests that the plea entered was a negotiated plea. Other parties were involved in this same transaction but the

defendant appears to have been the initiator of the armed robbery of the decedent and the only one who was armed. See People v. Bell, 4 Ill.App.3d 397, 280 N.E.2d 487; People v. Love, 6 Ill.App.3d 577, 286 N.E.2d 355.

The probation officer's presentence report was a part of the record and considered by the trial court and properly so. (People v. Tice, 89 Ill.App.2d 313, 231 N.E. 2d 607.) However, the trial court did state "last week we showed the presentence report filed and we are now down to evidence in aggravation and mitigation". Both counsel answered in the affirmative. Referring to this report, the court then asked if there were any errors that should be corrected and both counsel responded in the negative. The presentence report and its contents were made a part of this record.

Our previous remand was solely to furnish a reviewable evidentiary basis for the sentence imposed. Under the circumstances now shown by this record, we cannot say that the penalty imposed constitutes any great departure from the fundamental law and its spirit and purpose, or that the penalty is manifestly in excess of the constitutional prescription which requires all penalties to be proportionate to the nature of the offense. Accordingly, the judgment of the trial court should be and it is hereby affirmed.

Judgment affirmed.

Craver, P.J. and Simkins, J. concur.

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge

HONORABLE SAMUEL O. SMITH, Judge

HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 6th day
of December A. D. 1972, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

| | | |
|----------------------------------|---|-----------------|
| People of the State of Illinois, |) | |
| |) | |
| Plaintiff-Appellee |) | Appeal from |
| |) | Circuit Court |
| vs. |) | Sangamon County |
| |) | |
| Rickie Seymour and Louis B. |) | |
| Partin, |) | |
| Defendants-Appellants |) | |

MR. JUSTICE SMITH delivered the opinion of the court:

The defendants pleaded guilty to attempted armed robbery and were sentenced to the penitentiary for a term of 2 to 14 years in Sangamon County. The Illinois Defender Project, appointed on the appeal, moved to withdraw as defense counsel and accompanied the motion with a brief in conformity with Anders v. California, 386 US 738, 18 L Ed 2d 493, 87 S Ct 1396. The motion was served on the defendants together with its accompanying brief and the hearing was continued for 60 days by this court for the defendants to file any further or additional suggestions. Letters protesting their innocence

were filed and it is a fair summary of their contents that the matters therein recited are largely dehors the record or not supported by it.

The defendants were represented by counsel of their own choice in the trial court. They were charged in an indictment along with one Charles Holmes who is not a party to this appeal with murder and attempted armed robbery, during the course of which one Kenneth White was shot and killed by Holmes. Seymour contended that at the time his plea of guilty was entered he was not physically able to enter a plea. His counsel informed the court that Seymour was ill and could not go to trial. The court heard testimony as to his health and his actions in the county jail and found that defendant Seymour was ready to go to trial and that his conduct was to avoid the calling of his case for trial. Counsel then asked for a recess to obtain the doctor's report which was granted and the case was recessed until after lunch. Defendant Seymour called no witnesses and after the recess both defendants tendered their pleas of guilty to attempted armed robbery.

Such plea was the result of a plea agreement between counsel and the State's attorney and made a matter of record. The agreement was for the State to dismiss the murder count in exchange for guilty pleas to the armed robbery attempt. There was no agreement as to the recommended penalty for either

defendant. After conducting a hearing on probation and aggravation and mitigation, the court sentenced each defendant to a term of 2 to 14 years.

The record shows full compliance by the trial court with Supreme Court Rule 402 and with the finding of the court that both the plea of guilty and the plea negotiation were knowingly, voluntarily and freely made. Under these circumstances, we agree with the Illinois Defender Project that there is no justiciable issue for review and that the appeal is frivolous and without merit.

Accordingly, the petition of the Illinois Defender Project to withdraw as attorney for the defendants is allowed and the judgments of the trial court are affirmed.

Judgments affirmed.

Craven, P.J. and Simkins, J. concur.

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge

HONORABLE HAROLD E. TRAPP, Judge

HONORABLE LELAND SIMKINS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 6th day
of December A. D. 1972, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

General No. 11769

People of the State of Illinois,

VS.

James R. Loyd, Jr.,

Defendant-Appellant

Appeal from
Circuit Court
Edgar County

MR. PRESIDING JUSTICE CRAVEN delivered the opinion of the court:

In January 1968, the defendant was arrested on a charge of battery. Subsequently, numerous additional charges were filed. On May 9, 1968, an information charging theft was filed by the state's attorney. With court-appointed counsel, defendant waived indictment and after a full and complete admonishment pleaded guilty to the theft charge. He was sentenced to a term of not less than 3 nor more than 5 years.

In September 1969, the defendant instituted post-conviction proceedings. His petition for post-conviction relief was not subject to any responsive pleadings by the State for a considerable period of time. When the case was finally set for hearing, a motion by the State to file a late responsive pleading, either in form of an answer or motion to dismiss, was denied. The court indicated

that the petitioner's evidence would be heard and that he would not treat the petition having been filed and no response thereto as a default matter but would require evidence to sustain the allegation of the petition.

At the post-conviction hearing, the defendant testified, relating the chronology of the events surrounding his arrest and the filing of the various charges. The thrust of his testimony as it relates to the asserted denial of constitutional rights is the allegation that the theft charge was filed subsequent to a conference between the defendant and defense counsel and was based upon information the defendant related to his attorney. He thus contends that his counsel, in turn, related the relevant information to the state's attorney and that the state's attorney thereafter filed the information charging theft based upon the confidential information.

We find no support in the record to establish this serious allegation which, if true, would show that defense counsel violated the attorney-client privilege. Rather, the record of the original proceedings establishes that the prosecution had prior independent knowledge of the facts supporting the theft charge. Furthermore, a realistic examination of this record shows a form of plea bargaining, although not expressly so labeled. The proceedings here of course antedate the provisions now found in Rule 402 and the specifics of any agreement, if there was an express agreement, are not of record. However, it is clearly

indicated that the defendant knowingly and voluntarily entered a plea of guilty to the theft charge, that a factual basis of the charge was established and that upon such plea of guilty after a full admonition, a pending indictment charging five counts of burglary and an additional count of theft was dismissed by the State. An allegation of inadequacy or incompetency of counsel in order to be sustained must be established by evidence showing actual incompetence and further that the defendant's rights were substantially prejudiced by reason thereof. (People v. Logue, 45 Ill.2d 170, ___ N.E.2d ___, and cases there cited.) This record falls far short of establishing either incompetence or substantial prejudice. It does not establish a breach of the attorney-client privilege. The circuit court of Edgar County properly denied post-conviction relief and the judgment of that court is affirmed.

JUDGMENT AFFIRMED.

TRAPP, J., and SIMKINS, J., concur.



ABSTRACT

MAY 1 1973



56000

8 I.A.³ 754

PEOPLE OF THE STATE OF ILLINOIS,)
Plaintiff-Appellee,)
vs.)
CHARLIE H. GATES,)
Defendant-Appellant.)

APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY.

Hon. Philip Romiti,
Presiding.

Mr. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

Charlie Gates (defendant) was indicted for murder (Ill. Rev.Stat. 1969, ch.38, par.9-1) and also for aggravated battery (Ill.Rev.Stat. 1969, ch.38, par.12-4.) After a bench trial, he was found guilty of voluntary manslaughter and aggravated battery. He was sentenced to penitentiary terms of eight to 15 years for manslaughter and two to five years for aggravated battery, to run concurrently. Although the common law record reflects a minimum sentence of three years on the aggravated battery charge, it appears that the report of proceedings accurately shows this minimum sentence to be two years. In his appeal, defendant raises only one issue, contending that the sentence is excessive.

The prosecution evidence was, in substance, that defendant was separated from his wife and their children. She was living temporarily with friends. Defendant came to visit and was asked to leave. He then kicked in a panel of the door and entered. After an argument, he stabbed his wife five times. It is agreed that defendant was unarmed when he entered the apartment. The knife had been placed in the living room by his wife. Another person present, George Craft, came into the room to remonstrate with defendant. Defendant turned against Craft and stabbed him so that he staggered out of the apartment and fell dead upon the

landing outside. Defendant then pulled his wife out of the apartment and dragged her downstairs. He was accosted by police and immediately denied guilt.

Defendant testified that he did not kick down the door but entered peacefully. He engaged in an argument with his wife and she picked up the knife and assaulted him. Deceased came behind defendant and defendant felt something hard in his back which he thought was a gun. Defendant obtained possession of the knife. He testified that he did not recall stabbing any person but thought that he might have hit something since the knife was bent.

By way of mitigation, defendant's counsel argues vigorously that the domestic life of defendant and his wife showed an effort by defendant to be a good husband and father; that he acted only under extreme provocation; that he was never previously found guilty of a felony and that the sentence is so excessive as to prevent rehabilitation. The evidence here shows that defendant did have a good work record for steady employment.

On the other hand, the State argues in aggravation that the crime was actually committed without sufficient provocation and that defendant's conduct evidenced a violent disposition. The State points out that in 1963 defendant was found guilty, in Ohio, of carrying a concealed weapon for which he was sentenced to six months in jail and was then also fined \$100 for impersonating a police officer. In 1965, also in Ohio, he was found guilty of assault and battery, for which he received a three day jail sentence, and also a malicious destruction for which he was fined. In 1968, in Ohio, he was found guilty of carrying a concealed weapon and was sentenced to 30 days in jail and a \$200 fine. In 1970, in Chicago, he was found guilty of battery and sentenced to 30 days in jail. His counsel urges that the last offense arose from a domestic problem.

The divergent legal principles bearing upon the question of reduction of sentence by reviewing courts have been frequently stated. Compare People v. Fox, 48 Ill.2d 239, 251, 269 N.E.2d 720 and People v. Holmes, 127 Ill.App.2d 209, 214, 262 N.E.2d 45, which reflect one theory, to People v. Livingston, 117 Ill.App.2d 189, 193, 254 N.E.2d 64 and People v. Lillie, 79 Ill.App.2d 174, 178, 223 N.E.2d 716 which epitomize the other point of view. Note also, People v. Lampley, 1 Ill.App.3d 282, 274 N.E.2d 171 including the dissenting opinion. The problem is determination of the category into which the case at bar should be classified.

After mature deliberation, we reject the contention that the sentence should be reduced. We believe that the able trial judge was in a superior position to evaluate this entire situation. We find no compelling reason to differ from the result he reached.

The judgment and sentence appealed from are affirmed.

Judgment affirmed.

BURKE, J. and LYONS, J. concur.

ARST.

ASSOCIATION

57082

P.T.A.³ 768 MAY 1 1973

PEOPLE OF THE STATE OF ILLINOIS,) APPEAL FROM
Plaintiff-Appellee,)
) CIRCUIT COURT,
vs.)
) COOK COUNTY.
RICHARD MATTOX,)
Defendant-Appellant.) HON. JOSEPH A. POWER,
Presiding.

MR. JUSTICE BURKE delivered the opinion of the court:

In August 1965, defendant was found guilty at a bench trial of the crime of murder and sentenced to a term of twenty years to thirty years in the penitentiary. The judgment was affirmed on direct appeal to this court in May 1968. People v. Mattox, 96 Ill. App.2d 143, 237 N.E.2d 845, leave to appeal denied, 40 Ill.2d 578.

In August 1970, defendant filed, pro se, a petition pursuant to the Post-Conviction Hearing Act wherein he sought leave to proceed in forma pauperis. (Ill.Rev.Stat.1969, ch. 38, par. 122-1 et seq.) Defendant also stated in his petition, in a highly conclusory fashion, that his constitutional right to a fair trial was denied him in several respects.

The motion judge treated defendant's pro se petition as an application for post-conviction relief, and on October 8, 1970, the court appointed counsel for him. On February 25, 1971, an amended Post-Conviction Petition, supported principally by defendant's own affidavit, was filed.

In substance defendant in his amended Post-Conviction Petition and in his brief charged the following resulted in violations of defendant's constitutional rights: (1) that the transcript of defendant's interrogation was obtained and admitted in violation of the fifth, sixth and fourteenth amendments because he was deceived as to his right and denied the assistance of counsel despite his request for and attempt to contact counsel; (2) that defendant's statement (exhibit 24) was made during a period of

illegal detention and should be excluded; (3) that a transcript of previous testimony (exhibit 25) was admitted in violation of the fifth and fourteenth amendments because defendant was incompetent and coerced into testifying and the transcript contained his criminal record; (4) that the State acquired exhibits 16 through 23B in violation of the fourth and fourteenth amendments; (5) that defendant's trial counsel was incompetent and ineffective because he did not object to the unconstitutionally obtained evidence; (6) that defendant's appellate counsel was ineffective and incompetent because he did not raise apparent constitutional issues on appeal; and (7) that the court, in considering the post-conviction motion, applied an improper standard to the acknowledged constitutional errors.

A motion to dismiss the amended petition was filed by the People, on the grounds that the amended petition failed to allege any constitutional questions as required by the Post-Conviction Hearing Act; that those of defendant's allegations which might in their broadest sense be construed as raising constitutional questions were merely bare allegations which, on numerous occasions, had been held by the Supreme Court of Illinois to be not sufficient to require a hearing, and that the issues raised in the amended petition were res judicata since they could have been raised on appeal to this court from the judgment of conviction. Hearing on the People's motion was held on June 15, 1971, after which the court entered an order dismissing the defendant's amended petition.

Defendant appealed the dismissal of his amended petition directly to the Supreme Court, which transferred the cause to this court. (People v. Mattox, Ill. Sup. Ct. Doc. No. 44613, January Term, 1972; see also Sup. Ct. Rule 651, Ill. Rev. Stat. 1971, ch. 110A, par. 651, as amended July 1, 1971.)

We address ourselves to one threshold question, namely, whether defendant has adequately supported his petition and made a substantial showing that his constitutional rights have been violated.

Under the Post-Conviction Hearing Act a substantial showing must be made that the petitioner's constitutional rights have been violated; bare allegations or conclusions to that effect will not be deemed sufficient to require an evidentiary hearing. *People v. Smith*, 44 Ill. 2d 82, 254 N.E.2d 492.

In *People v. Hysell*, 48 Ill. 2d 522, 272 N.E.2d 38, the Supreme Court stated that:

"In order to require an evidentiary hearing, a post-conviction petition must make a substantial showing that the defendant's constitutional rights have been violated. Such showing must be based on factual allegations rather than conclusional statements."

Recently this court in *People v. Manns*, 5 Ill. App. 3d 679, 283 N.E.2d 909, in considering the adequacy of a Post-Conviction Petition and its supporting documents stated:

"A post-conviction petition and its supporting documents must make a substantial showing that constitutional rights have been violated and allegations and conclusions to that effect are not sufficient to meet the requirements of Ill. Rev. Stat. 1969, Chap. 38, Para.122-2."

In the instant case, defendant's amended Post-Conviction Petition is supported principally by a four page affidavit of defendant. This affidavit is replete with bare self-serving allegations of a highly conclusory nature which are not sufficient to meet the requirements of the Post-Conviction Hearing Act.

Upon a review of the record, we are of the opinion that the contentions, including the incompetency allegations, are either without merit or bare allegations and are not sufficient to meet the requirements of Ill.Rev.Stat. 1969, ch. 38, par. 122-2.

Our holding that defendant's amended petition and supporting

documents do not make a substantial showing that defendant's constitutional rights were violated is dispositive of this appeal and it is not necessary to consider individually the alleged constitutional errors urged by defendant.

Defendant's amended Post-Conviction Petition was properly dismissed and the order is affirmed.

ORDER AFFIRMED.

GOLDBERG, P.J., and LYONS, J. concur.



MAY 1 1973

No. 57462

| | | |
|----------------------------------|---|------------------|
| PEOPLE OF THE STATE OF ILLINOIS, |) | APPEAL FROM THE |
| |) | CIRCUIT COURT OF |
| Plaintiff-Appellee, |) | COOK COUNTY. |
| |) | |
| vs. |) | |
| |) | |
| JEFFERY W. KING, |) | HONORABLE |
| |) | FRANK WILSON, |
| Defendant-Appellant. |) | PRESIDING. |

MR. PRESIDING JUSTICE MCGLOON delivered the opinion of the court:

Defendant, Jeffery W. King, was charged with the offense of armed robbery. After pleading guilty as charged, the defendant was admitted to five years probation. It was a condition of that probation that defendant would not violate any criminal law of the State of Illinois. After defendant was subsequently convicted of burglary, and after he failed to report to his probation officer, a rule to show cause why his probation should not be terminated was issued. The defendant's attorney stipulated that the defendant had failed to report to his probation officer. In addition, the defendant admitted on direct questioning from the bench that he was convicted of the offense of burglary on November 8, 1971. Based on the failure to report to the probation department and conviction for burglary, the defendant's probation order was revoked, and he was sentenced to two to four years in the penitentiary, this sentence to run concurrently with the sentence of burglary.

The public defender was appointed to represent the defendant in an appeal of this conviction. He now moves for permission of this court to withdraw as attorney of record for the defendant and has filed such motion pursuant to Anders v. California (1967), 386 U.S. 738. Notice of that motion and copies of the petition and brief were mailed to the defendant. Defendant has not responded.

In his brief in support of his motion to withdraw, the public defender states that the record indicates only one possible issue that could be raised on appeal. That issue is whether the defendant was denied procedural due process of law in his probation hearing. The public defender further argues and concludes in his

brief in support of his petition that any appeal on this issue would be without merit and frivolous. We agree.

Where an order to revoke probation is sought, the general procedure to be followed is set forth in Ill.Rev.Stat. 1971, ch.38, par.117-3(b) and is articulated in the often cited case of People v. Price (1960), 24 Ill.App.2d 364, 164 N.E.2d 528. There the court discussed the procedural requirements for a hearing at length noting at page 376 that:

What our courts have held is that a defendant in every case where probation has been granted is entitled to a conscientious judicial determination according to accepted and well recognized procedural methods upon the question whether the conditions imposed upon the defendant when he was admitted to probation have been violated.

The guidelines for the revocation procedure are as follows: (1) The defendant must be notified of the alleged violations of his probation; (2) The defendant must be given an opportunity to defend against, and to refute, the alleged violations; (3) The State having the burden of proof, must prove the alleged violations by the preponderance of the evidence by competent evidence. People v. Dotson (1969), 111 Ill.App.2d 306, 250 N.E.2d 174; People v. Thornton (1972), 4 Ill.App.3d 896, 282 N.E.2d 276.

A review of the record in the instant case discloses that the procedure followed by the trial court was substantially in accordance with these guidelines in that defendant's procedural guarantees were adhered to.

Any appeal from these proceedings would be frivolous and without merit. Therefore, the motion of the public defender is allowed, and the judgment of the trial court is affirmed.

Judgment affirmed.

Dempsey and McNamara, JJ., concur.



MAY 1 1973

56179

STA³ 799

| | | |
|-------------------------------------|---|-------------------------|
| CLIFFORD PETERSON TOOL CO., et al., |) | |
| |) | APPEAL FROM THE CIRCUIT |
| Plaintiffs--Appellants, |) | COURT OF COOK COUNTY. |
| |) | |
| vs. |) | |
| |) | |
| SAM SUSSMAN, et al., |) | Hon. David N. Canel, |
| |) | Presiding. |
| Defendants--Appellees. |) | |

Mr. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

Clifford Peterson Tool Company and Max Steiner (plaintiffs) filed an amended complaint against Sam Sussman and seven other persons (defendants). The complaint charged that while defendants were employed by plaintiff company they converted and misappropriated merchandise, inventory and other property over a period of years. Plaintiffs alleged that this loss was first discovered by them on February 16, 1965. The case was assigned for trial in the circuit court of Cook County. The court heard evidence; and, on February 3, 1971, entered an order finding the issues in favor of defendants and dismissing the suit. A written motion for a new trial was made by plaintiffs and denied. Plaintiffs appeal.

The record shows that on February 2, 1971 when the case was first called for trial, with leave of court, defendants filed an amendment to their answer in which they alleged that the suit was barred by the statute of limitations because the alleged acts of defendants occurred more than two years prior to the filing of the original complaint on August 30, 1967. Testimony was taken by the trial court and the record contains a report of proceedings which exceeds 100 pages. These proceedings culminated in a judgment order entered by the trial court on February 3, 1971. The order recites that the court heard the evidence and

argument of counsel and found that the statute of limitations was properly pleaded by defendants. In this order, the court further found the issues in favor of defendants and entered judgment in favor of defendants and against plaintiffs.

On March 2, 1971, defendants filed a motion to vacate this order and for a new trial. The motion set out that the two year statute of limitations upon which the court relied was not applicable but that the proper limitation period was five years (Ill.Rev.Stat. 1971, ch.83, par.16); and, in addition, that the statute would not start to run upon the claim of plaintiffs because of fraudulent concealment by defendants so that the action could have been commenced by plaintiffs at any time within the five years after their discovery thereof. Ill.Rev.Stat. 1971, ch.83, par.23.

After hearing argument, the trial court entered a lengthy draft order reciting that the court had previously heard evidence on the issues and containing a number of other recitals of fact. It was ordered that the prior order dismissing the cause entered February 3, 1971 be amended to show "****that there was not one iota of evidence produced on the day of trial of any theft on the part of anybody." The motion for new trial was, therefore, denied.

In this court, plaintiffs make but one contention; namely, that the court erred in applying the two year statute of limitations when the applicable statute was actually five years. No other point is raised or argued by plaintiffs. It is agreed by defendants that the proper limitations period was five years. However, defendants urge that the court actually heard evidence on the merits of the case, concluded that plaintiffs had failed to make the necessary proof and consequently dismissed the suit for lack of evidence.

It is correct, as pointed out by defendants, that the record affirmatively shows that the trial court did not dismiss plaintiffs' case because of the plea of statute of limitations. This is established by the specific recital in the first order for dismissal entered February 3, 1971. In that order, the court found that the statute of limitations had been properly pleaded but the order also proceeds to recite that, "The court further finds the issues in favor of defendants and against the plaintiffs." It is also true, as contended by defendants, that the finding pertaining to "proper pleading" of limitations is not equivalent to an order sustaining the plea as a defense. The order recites adequate and sufficient ground for dismissal of the case on the merits without reference to applicability of the statute of limitations. This point is not considered or raised by plaintiffs in their brief. Therefore, it is deemed waived. Supreme Court Rule 341(e)(7). (Ill.Rev.Stat. 1971, ch.110A, par.341(e)(7).) American National Bank & Trust Co. v. Scenic Stage Lines, 2 Ill.App.3d 446, 448, 276 N.E.2d 420.

Furthermore, we have reviewed the entire report of proceedings and we agree with the statements made by the trial judge that all of the evidence adduced by plaintiffs failed to prove the allegations of plaintiffs' complaint as amended.

For these reasons the orders appealed from dismissing the suit and denying plaintiffs' motion for a new trial are affirmed.

Orders affirmed.

BURKE, J. and BURMAN, J. concur.

72-175

UNITED STATES OF AMERICA

8 I.A.³ 847

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Acting Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable GLENN K. SEIDENFELD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
December 6, 1972 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FILED

DEC 6 - 1972

HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

| | | |
|----------------------------------|---|-------------------------------|
| PEOPLE OF THE STATE OF ILLINOIS, |) | |
| |) | |
| Plaintiff-Appellee, |) | Appeal from the Circuit Court |
| |) | of the 18th Judicial Circuit, |
| v. |) | DuPage County, Illinois. |
| |) | |
| EDWIN GRACE, |) | |
| |) | |
| Defendant-Appellant. |) | |

MR. JUSTICE THOMAS J. MORAN delivered the opinion of the court:

A two-count indictment charged defendant with armed robbery and robbery. The public defender filed motions to suppress the identifications and confessions and, during the proceedings, orally moved to challenge the defendant's arrest. After hearing, the motions were denied. Defendant then entered a negotiated plea of guilty to the charge of robbery and was sentenced to a term of one to five years.

While the appeal was pending, appointed counsel filed a motion to withdraw as attorney. In support of the motion, the well-drawn brief raises the following questions: did the trial court properly admonish the defendant; was the plea of guilty voluntarily and intelligently entered; was defendant properly advised prior to making incriminating statements; was he advised of his right to counsel prior to the line up, and was his arrest valid.

The transcript discloses that, at the time of the plea, defendant (who admitted to three previous incarcerations) was not explicitly told "he had a right to plead guilty or to plead not guilty," as expressed in Supreme Court Rule 402 (a)(3). Defendant, however, was advised that he had a right to have his guilt or innocence determined by a jury and that he would be presumed innocent until proven guilty beyond a reasonable doubt. We find this to be sufficient compliance with the Rule.

It is brought to our attention that the court did not expressly agree to the plea arrangement (Supreme Court Rule 402 (d)(2)), but since the court sentenced defendant to the exact term contained in the plea agreement, any possible error in this regard was alleviated.

The record reveals that the defendant comprehended the meaning and effect of the court's admonishment, and that his plea was entered both voluntarily and intelligently. The trial court substantially complied with Rule 402.

After entry of the plea, defendant requested, but was denied, a transcript of the proceedings taken at the hearing on his motions to suppress. The denial was remedied when the Supreme Court ordered the transcript furnished. Counsel, after a review of the hearing, found no violations.

Illusory issues arising from this hearing question whether the defendant was properly advised of his rights prior to making incriminating statements and prior to any line up. Defendant denied having been properly informed at any time, while the arresting officer testified that he had been advised at all times. This conflict called for a determination by the trial court and its decision, unless against the manifest weight of the evidence, will not be disturbed. From a review of the record, we find that the trial court did not abuse its discretion.

Witnesses to the offense gave the arresting officer a description of the person involved: a male negro, about 6'2" tall with an Afro hairstyle, long side burns,

mustache and dark complexion, wearing striped trousers, a leather jacket and a dark shirt. Also included was a description of the car used in the crime and its license plate number. A check on the vehicle registration disclosed the name and address of a Chicago owner. Based upon this, a John Doe arrest warrant was issued. The same police officer who had taken the description, accompanied by Chicago authorities, went to the address and there saw the described vehicle. Proceeding to the apartment of the owner of the car, the officers were invited inside. Upon entry, defendant was recognized as fitting the description of the person involved in the offense and he was arrested.

At the hearing to suppress, the proof was not clear as to whether a description of the man sought was contained in the arrest warrant and the warrant was not introduced into evidence. Assuming that the John Doe warrant did not contain a description of the defendant, the arresting officer knew that a crime had been committed, the victim had given him a description of the person involved, and the defendant's whereabouts were traced through the vehicle used in the armed robbery. These facts were sufficient probable cause for the officer to make a valid arrest of the defendant, regardless of whether the warrant contained his description.

After a total review of the record (as required by Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493, 498, 87 S. Ct. 1396 (1967)), we conclude that the appeal herein lacks merit.

The motion to withdraw is allowed and the judgment of the trial court is affirmed.

Motion to withdraw allowed; Judgment affirmed.

SEIDENFELD, P.J. and ABRAHAMSON, J. - Concur



81.A³871

72-63

STATE OF ILLINOIS

DAVID JOE STARKEY VS. RUSSELL D. LINDSEY



APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at
Ottawa, on the 1st Day of January in the Year of our Lord
one thousand nine hundred and seventy-two, within and
for the Third District of Illinois:

Present—

* HONORABLE JAY J. ALLOY, Presiding Justice

HONORABLE WALTER DIXON, Justice

HONORABLE ALBERT SCOTT, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on

DECEMBER 7, 1972

_____ the Opinion of the
Court was filed in the Clerk's Office of said Court, in the
words and figures following, viz:

In The
APPELLATE COURT OF ILLINOIS

Third District

A. D. 1972.

| | | |
|----------------------------|---|---------------------|
| DAVID JOE STARKEY, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellant, |) | Rock Island County. |
| |) | |
| v. |) | |
| |) | |
| RUSSELL D. LINDSEY, et al, |) | Honorable |
| |) | Paul E. Rink, |
| Defendants-Appellees.) |) | Judge Presiding. |

Mr. JUSTICE ALLOY delivered the opinion of the court:

Abstract

Plaintiff David Joe Starkey appeals from the action of the circuit court of Rock Island County in directing verdicts for Russell D. Lindsey and Fred L. Meersman, d/b/a Bon-Air Tavern & Liquor Store, in an action seeking a recovery on the theory of common law negligence against Russell D. Lindsey and in a dramshop action against Fred L. Meersman d/b/a Bon-Air Tavern & Liquor Store.

The record discloses that an automobile collision from which the litigation arose occurred January 10, 1970, at approximately 12:30 A.M. on 27th Street in Moline near the tavern and liquor store operated by defendant Meersman. At this point, 27th Street is a north-south thoroughfare with two lanes of traffic in each direction. There is a median, upon which shrubs have been planted, which divides the highway. The tavern and its parking lot are located adjacent to the eastern, or outer, traffic lane. At the time under consideration, the plaintiff David Joe Starkey, together with Jim Michaels, was a passenger in an automobile being driven north by James

Orendorff. As the highway near the tavern premises was being approached by the Orendorff automobile, a motor vehicle emerged from the tavern parking lot directly in front of the Orendorff car, turned north in such manner as to utilize parts of both northbound lanes, and proceeded onward without any contact or collision with the Orendorff automobile in which plaintiff was riding. To avoid the imminent collision with this vehicle which emerged from the parking lot, Orendorff had swerved to the left, crossed both northbound lanes, jumped the median strip, and collided head-on with a vehicle traveling in the inner southbound lane. Plaintiff's complaint charged that Lindsey was the driver of the automobile which emerged from the parking lot and that he was intoxicated in whole or in part as a result of intoxicants furnished by Meersman and consumed on the tavern premises.

Trial was held approximately 20 months after the occurrence. To sustain the burden of proving that Lindsey was the driver of the automobile which had come out of the parking lot, plaintiff first called Lindsey himself as an adverse witness. Lindsey, a 49-year-old employee of the Illinois Department of Revenue, testified that he had made business calls at the tavern from time to time; that he and Meersman and their families were personal friends; and, that in the period around January 10, 1970, he would stop in the tavern as a patron two or three times a week. When asked directly if he had been in the tavern on the evening of January 9, 1970, or the early morning of January 10, 1970, Lindsey stated that it was possible, but that it was so far back that he just could not remember.

Another witness for the plaintiff on the issue of the driver's identity was Richard Glazebrook, who stated that he knew Lindsey very well prior to the occurrence and had engaged in some sales tax business and political activity with him, and because both were patrons of Meersman's

tavern. Glazebrook testified that he had stopped in the tavern about 11:30 P.M. on January 9, 1970, while he was on his way home from work, to purchase some beer and groceries. He also stated that while he was standing in line to pay for his purchases he looked through a door leading to the barroom of the premises and noticed a man with a "flower garland on his head" drinking with other persons at the bar. He stated that he was in the habit of looking into the barroom and would on occasion go in and have a beer if he saw someone he knew. Lighting conditions, he stated, were such that the persons in the barroom could not be seen clearly from the position where he was standing. He further testified that while he was still waiting in line to pay for his purchases, the man with the flowers in his hair came out of the barroom, paused at the door leading to the outside for a moment, at which time the witness got "a sort of back profile" or "oblique" view of him. When he was asked if he knew the identity of the man at that time, he said that he did not.

Glazebrook further stated that he left the tavern after paying for his purchases, and that as he was walking to his car in the tavern parking lot, the man with flowers in his hair drove past him and pulled out into traffic on 27th Street. The witness said he then heard the brakes of the Orendorff vehicle being applied and turned and watched as it swerved to the left, crossed over the median and collided with another vehicle. When he was asked if he knew the identity of the man with flowers in his hair on the next day, Glazebrook responded that he really hadn't thought about it because he was thinking more of the people who were hurt. He was then asked, "Now, based upon a reasonable certainty, do you now know the identity of this man?" An objection by defense counsel was sustained, whereupon plaintiff's counsel requested, and was granted an opportunity to make an offer of proof.

Outside the presence of the jury, Glazebrook was asked twice if he "now knew the identity of the man" and he twice responded that he did not, although on the second occasion he asked the court if he could qualify his answer and was refused. On further questioning, however, the witness conceded that he had previously expressed an opinion to plaintiff's counsel that the man was Russell Lindsey; that the man he saw had characteristics similar to those of Lindsey; and, that he first connected Lindsey with the accident when someone investigating it "brought up his name and asked if it could be him." He was then asked, "then based on reasonable certainty and to the best of your recollection, who was the man you saw?" Glazebrook then responded, "In my opinion it would be Russell Lindsey, yes." On cross-examination by defense counsel, the witness again admitted that he knew Lindsey very well, and also admitted telling another investigator some three months after the accident that he had never seen the driver of the car before or since. The trial court then ruled that such evidence could not be submitted for the jury's consideration. The correctness of this ruling is the first issue raised on appeal.

The parties agree that positive knowledge of a witness is not required before his testimony is admissible, and that his "belief" or "impression", will in most cases suffice, so long as he had an opportunity of personal observation from which to gain such belief, impression or opinion. (Wigmore on Evidence, 3d Edition, sec. 658(b) and cases there cited.) In the case before us, Glazebrook had the opportunity of personal observation, and, without more, his identification of Lindsey based upon similarity of features and characteristics would, in the judgment of this court, have been admissible, and, subject to cross-examination, could be accorded such weight as the trier of facts sought fit to give it. We have the unique circumstance here that

Glazebrook knew Lindsey very well; that he repeatedly testified that he did not know the identity of the man he saw in the tavern on the night of the occurrence; and, he also testified that Lindsey's name had never occurred to him until it was mentioned to him by someone investigating the accident. Defendants contend that in view of the foregoing circumstances, the "opinion" of the witness that the man was Lindsey is reduced to mere suspicion and conjecture and is, therefore, inadmissible. Plaintiff, however, asserts that it is not unusual for Glazebrook to have later "put all the pieces together" and to have realized that it was Lindsey whom he saw. Plaintiff contends that the apparent contradictions in Glazebrook's testimony went to the weight of the proffered testimony rather than its competency.

While we have found no authority based upon a precisely similar situation, we believe that what is involved here is the credibility of the witness, his willingness to testify and his motives for testifying as he did. The record shows self-contradictory evidence with Glazebrook first denying that he knew the identity of the driver of the car, and then expressing a laboriously extracted opinion that he was certain it was Lindsey, an opinion which had been expressed to plaintiff's counsel prior to trial. We note that it is the traditional function of the jury to resolve conflicts in evidence, and to determine the credibility of a witness, as well as to draw permissible inferences from the witness's testimony and to determine its weight. With the objective in mind that it is the purpose of all trials to arrive at the truth, taking into account the entire testimony of the witness, we believe that the proffered testimony, and any cross-examination thereon, should properly have been submitted to the jury. We believe that men of reason could conclude that the contradictions may have stemmed from Glazebrook's reluctance to testify against an acquaintance on one hand as contrasted with sympathy for the accident victim or from a truly belated recognition of Lindsey. We, therefore,

conclude that the trial court erred in denying the offer of proof under the facts in this case.

Plaintiff also attempted to connect Lindsey with the occurrence by photographs of an automobile, a part of which were excluded from the evidence for lack of proper foundation and the balance of which were denied admission on the ground of irrelevance. Since in our view the cause must be tried again as to defendant Lindsey, no useful purpose can be served by discussing this contention in detail. It will suffice for us to observe, on the basis of the record here presented, that there was no clear or satisfactory proof that the car shown in the photograph had been owned by Lindsey, and that we consider the rulings of the court to have been proper.

It is further contended by plaintiff that the court erred in directing a verdict in favor of defendant Meersman in the dramshop action and that the court also erred in refusing to strike an affirmative defense pleaded by such defendant. On the basis of the record, we note that there was a total lack of proof that Meersman or anyone in his employ had sold or given liquor to the man seen leaving the bar and the only proof on the subject of his intoxication was Glazebrook's testimony that he "formed the impression" that the man "obviously had been drinking rather heavily." There is nothing in the record to show that intoxicating liquor was sold or given to Lindsey in the tavern. To establish a prima facie case against Meersman, plaintiff was required to prove that intoxicating liquor had been served at the tavern to the person accused by plaintiff and that the liquor so served contributed to the intoxication of such person and that the plaintiff's injury resulted herefrom. (Dunkelberger v. Hopkins, 51 Ill. App. 2d 205.) Since the verdict was directed for defendant Meersman at the close of plaintiff's evidence, and before any evidence was introduced in support of the affirmative

defense of which complaint is made, it necessarily follows that any issue as to whether the court erred in refusing to strike the defense has become moot and need not be determined on appeal. Collins v. Barry, 11 Ill. App. 2d 119.

For the reasons stated, therefore, the judgment of the circuit court of Rock Island County is affirmed as to defendant Meersman, but is reversed as to defendant Lindsey, and as to defendant Lindsey the cause is remanded for a new trial.

Affirmed in part, reversed in part, and remanded with directions.

Dixon and Scott, JJ., concur.

8 I.A.³ 912

72-93

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice

Honorable MEL ABRAHAMSON, Justice

Honorable ALFRED E. WOODWARD, Justice

HOWARD K. KELLETT, Clerk

JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
December 11, 1972

the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

FILED
JAN 17 1972
HOWARD K. KELLETT, Clerk
Appellate Court, 2d District

| | | |
|----------------------------------|---|----------------------------|
| PEOPLE OF THE STATE OF ILLINOIS, |) | |
| |) | |
| Plaintiff-Appellee, |) | |
| |) | Appeal from the Circuit |
| vs. |) | Court for the 19th Judi- |
| |) | cial Circuit, Lake County, |
| WENDELL FLOYD, |) | Illinois |
| |) | Criminal Division |
| Defendant-Appellant. |) | |

MR. JUSTICE ABRAHAMSON delivered the opinion of the court.

On February 2, 1971, the defendant, Wendell Floyd, was indicted on four counts of forgery by a grand jury of Lake County in violation of Section 17-3 of the Illinois Criminal Code (Ill. Rev. Stat. 1969, ch. 38, sec. 17-3) and the office of the public defender was appointed to represent him.

On March 16, 1971, the defendant withdrew his previous plea of not guilty to count III of the indictment pursuant to a plea negotiation with the state. The tentative agreement between the parties was disclosed to the trial court in accordance with Supreme Court Rule 402 (Ill. Rev. Stat. 1971, ch. 110A, sec. 402, eff. Sept. 1, 1970) and the defendant was thoroughly admonished. Thereafter the court accepted a plea of guilty to that count and sentenced the

defendant to four years probation with the first 9 months to be served in the county jail. The other counts in the indictment were dismissed pursuant to the plea agreement. No appeal was taken from that judgment or conviction.

On September 28, 1971, the state filed a petition for revocation of probation wherein it was alleged that Floyd had committed the offenses of theft over \$150.00; fleeing or attempting to elude a police officer; and violation of the Cannabis Control Act. A hearing was held on October 21 on that petition where the defendant was again represented by the public defender. At the conclusion of the hearing, the court dismissed the allegation relative to the Cannabis Control Act but held that the state had established by a preponderance of the evidence that the defendant had committed the other offenses. The court then revoked probation on the grounds that the defendant had violated his probation in that he had committed a felony and a misdemeanor and sentenced him on the forgery conviction to a term of 2 to 8 years in the penitentiary. On November 4, a notice of appeal was filed in the trial court from that order and the Illinois Defender Project was appointed to represent Floyd.

On August 2, 1972, the Defender Project filed a motion to withdraw as counsel for the defendant for the reason that the appeal was without merit. A copy of that motion was furnished the defendant and it was continued to September 6 to permit him time to file any additional matters meritorious on his behalf.

Nothing further has been filed.

At the revocation hearing it was disclosed that Floyd and two other individuals had visited a used car lot in Zion on September 20, 1971. Floyd told the others to test drive a 1968 Plymouth automobile from the lot while he stayed and talked with the used car manager. A few moments later, Floyd told the manager that he was going to a nearby grocery store but would return. That was the last the manager saw of Floyd, his companions or the Plymouth.

On September 26, a Waukegan police officer stopped Floyd who was driving the 1968 Plymouth (with the same serial number as the car taken from the used car lot). As the officer approached the car, the defendant accelerated away and was only apprehended after a chase with speeds up to 80 M.P.H. and the defendant struck a parked car.

We are more than satisfied that the state proved a violation of the defendant's conditions of probation by a preponderance of the evidence as is required by law. (98 Ill. App. 2d 1, 4; People v. White, 239 N.E. 2d 854, 855; People v. Madden, 56 Ill. App. 2d 196, 198.) We are also of the opinion that the sentence imposed was not, in view of the defendant's previous record, excessive.

Accordingly, the motion of the defender to withdraw will be allowed and the judgment below affirmed.

LEAVE TO WITHDRAW AS COUNSEL GRANTED AND JUDGMENT AFFIRMED.

GUILD and WOODWARD, J.J., Concur.

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE SAMUEL O. SMITH. Presiding Judge
HONORABLE HAROLD F. TRAPP. Judge
HONORABLE LELAND SIMMONS. Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 13th day
of December A. D. 1972, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS
IN THE APPELLATE COURT
FOURTH DISTRICT

| | | |
|----------------------------------|---|-----------------|
| PEOPLE OF THE STATE OF ILLINOIS, |) | |
| Plaintiff-Appellee |) | |
| vs |) | |
| SYLVESTER HOLMES, |) | Appeal from |
| |) | Circuit Court |
| Defendant-Appellant |) | Sangamon County |

MR. JUSTICE SIMKINS delivered the opinion of the Court.

Defendant-Appellant Sylvester Holmes was convicted, on a plea of guilty, of the crime of involuntary manslaughter. It was not a negotiated plea. The defendant's petition for probation was denied, and he was sentenced to an indeterminate term of one to three years in the penitentiary. Defendant was represented by counsel retained by him. The Illinois Defender Project moved to withdraw as defendant's counsel and accompanied the motion with a brief in conformity with *Anders v State of California* 386 U.S. 738, 18 L.Ed, 2d 493, 87 S. Ct. 1396. The record shows proof of service of the motion and the brief upon the defendant. The motion was continued to enable the

defendant to file further or additional suggestions. None were filed.

In the discharge of our responsibility we have examined the record. It reveals a complete, careful compliance with the requirements of Supreme Court Rule 402 on the part of the trial judge. The defendant was admonished as to the nature of the charge, the minimum and maximum sentence prescribed by law was explained and illustrated by various examples; defendant's right to plead not guilty was explained to him, as well as the fact that there would be no trial if the court accented the plea, his waiver of trial by jury was carefully explained, a factual basis for the plea was established, the judge determined that the plea was freely and voluntarily made and not induced by threats or promises of any kind.

The defendant was accorded a full hearing on his petition for probation, following which neither the People nor defendant desired to offer evidence in aggravation or mitigation and agreed that the court might consider the evidence heard during the probation proceedings as bearing upon the issues of aggravation and mitigation. The sentence imposed is well within the statutory limits.

We agree that no error was committed in the trial court, and that this appeal is frivolous and without merit. Accordingly the petition of the Illinois Defender Project to withdraw as counsel for the defendant-appellant is allowed and the judgment of the trial court is affirmed.

Judgment affirmed.

Smith, P.J. and Trapp, J. concur.

STATE OF ILLINOIS

8 I.A.³ 957

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, _____ Presiding Judge

HONORABLE HAROLD F. TRAPP, _____ Judge

HONORABLE LELAND SIMKINS, _____ Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 6th day
of December A. D. 1972, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

DEC 6 1972

APPELLATE COURT

FOURTH DISTRICT

Robert L. Conn, CLERK
APPELLATE COURT-4TH DISTRICT

Agenda 72-40

Plaintiff-Appellant,

vs.

Decatur Park District, et al.,

Defendants-Appellees.

Appeal from
Circuit Court
Macon County

MR. PRESIDING JUSTICE CRAVEN delivered the opinion of the court:

This appeal arises from a judgment on a jury verdict in favor of defendant William West in a personal injury suit brought by Gloria Yeater, and on judgments in favor of defendant Park District and West entered on the pleadings.

Plaintiff brought suit in two counts: in the first count, plaintiff Gloria Yeater, an instructor at the ice skating rink of defendant Decatur Park District, sought recovery from Decatur Park District, a municipal corporation, owning and operating an ice skating rink in Decatur in connection with and as a part of its park district activities, for an injury occurring to plaintiff on January 4, 1969. Defendant West, a patron of the ice rink who also was employed as a guard at the rink but who was off duty at the time of the incident, allegedly skated backwards into plaintiff while she was giving ice skating lessons. Plaintiff was knocked to the ice and sustained injuries.

Plaintiff also sought to recover from defendant William West. This count against both defendants was based on negligence - - negligence of the Park District for failure to maintain proper supervision, and enforce its safety rules, and against West for his skating backwards contrary to rules of the Park District.

In the second count of her complaint, plaintiff sought judgment against West, the patron, in trespass on the case against the person of plaintiff.

Motions to dismiss were filed by both defendants.

Defendant West's motion to dismiss was denied.

Defendant Park District moved to dismiss upon various grounds, including (1) that there were no facts alleging defendant West was acting as its agent or employee at the time of the occurrence and that therefore the "doctrine of respondeat superior" was not applicable; (2) that defendant Park District was a "local public entity" within the meaning of the "Local Governmental and Governmental Employees Tort Immunity Act" (Ill.Rev.Stat., ch. 85, pars. 1-101, et seq.) and under paragraphs 3-108(a), 2-201, and 2-209 of that Act, it was not liable where the act or omission of its agent or employee did not constitute willful and wanton negligence. The court granted this motion.

Defendant West filed a general denial to Count II. Plaintiff filed an amended complaint in Count I against the Park District, alleging a duty on the Park District to operate the ice rink in a reasonably safe manner and its failure to

provide reasonable supervision over persons using the rink, and negligently omitting to enforce reasonable safety regulations.

Defendant Park District filed a further motion to dismiss the amended Count I. The court granted this motion. Plaintiff filed a second amended complaint as to defendant West.

During the jury trial, plaintiff obtained leave to and filed an amended complaint against West and added an additional count on the theory of trespass by West to the person of plaintiff. Defendant West filed a motion to dismiss additional Count II, which was denied. The trial proceeded. Upon completion of the evidence, defendant West filed a motion for directed verdict, which was denied. Subsequent pleadings were had during the trial, culminating with a denial by the court of defendant West's motion to dismiss Count I, but granting it as to Count II and directing a verdict for West on Count II based on trespass to the person of plaintiff.

Thus, the case went to the jury on Count I only against West. The jury returned a not guilty verdict as to West on amended Count I which charged negligence. Plaintiff elected to stand on Count I of the first amended complaint as to the Park District. The court dismissed the Park District as a defendant.

The case in this posture on appeal raises the questions: (1) Was it error to grant the Park District's motion to dismiss the amended complaint as to it; (2) was it error to direct a verdict for West on Count II charging trespass to the person; and, (3) was the verdict of the jury in favor of West on charges of negligence contrary to the manifest weight of the evidence?

Subsequent to the Molitor case (Molitor v. Kaneland Community Unit District No. 302 (1959), 18 Ill.2d 11, 163 N.E.2d 89), and the cases following it which abolished the doctrine of sovereign immunity of the state and its subsidiary municipal agencies, in 1965 the legislature of Illinois enacted the "Local Governmental and Governmental Employees Tort Immunity Act", relating to the tort immunity of local public entities, including park districts and their employees. (Ill. Rev.Stat. 1969, ch. 85, pars. 1-101 et seq.)

While such statute is in derogation of the common law as previously enunciated by the Supreme Court of this State and must be strictly construed, it places no duty on municipal authorities, such as park districts, to supervise an activity on or use of its public property. To the contrary, paragraph 3-108 of that Act relieves such local public entity and its employee from "liability for an injury caused by a failure to supervise an activity on or the use of any public property", except only in the use for purposes of swimming and as otherwise provided in that Act. We find no exception expressed which is applicable here.

While this court may or may not agree that this statute is "good" public policy, it is the public policy of this State as legislated. The fact that the park district here may have voluntarily undertaken a duty of supervision by rules and regulations and posting of notices does not make it liable for deficiencies in that supervision. The only cases interpreting this statute (Fustin v. Board of Education of Community Unit District

No. 2 (Fifth Dist. 1968), 101 Ill.App.2d 113, 242 N.E.2d 308; Woodman v. Litchfield Community School District No. 12 (Fifth Dist. 1968), 102 Ill.App.2d 330, 242 N.E.2d 780; and Mancha v. Field Museum of Natural History (First Dist.1972), 5 Ill.App.3d 699, 283 N.E.2d 899), hold that there is no liability on a local public entity for its acts or that of its employees unless such acts constitute willful or wanton negligence (Section 2-202 of the Tort Immunity Act, Ill.Rev.Stat.1969, ch. 85, par. 2-202).

It is unfortunate when a person, lawfully on premises of a park district or other similar state instrumentality, is injured, where some negligence of that district or its employee is involved. However, the public policy of this State, as now enacted by the Immunity Act above referred to, in the absence of a willful or wanton act, is that the employee and state instrumentality are exempt from liability. In this case, the defendant West was not even on duty as an employee of the defendant Park District at the time of the occurrence leading to plaintiff's injury. The trial court correctly dismissed the suit as to the Park District.

Our review of the record and pleadings and order concerning the charges against defendant West as to trespass to the person of the plaintiff lead us to conclude that the court correctly directed a verdict for West on this count. We will not review the historical or common law basis and distinctions of trespass, trespass vi et armis, and trespass on the case. These ancient historical writs served their purpose in the setting of the days of

court practice in which they were created and confirmed. Suffice it to say, intentional harm was and is an essential of trespass against the person. Neither the allegations of the amended complaint nor the evidence establish trespass. An unconsented contact to the person was not a sufficient allegation or proof as plaintiff contends. Prosser on Torts (2d Ed) Handbook, p. 24; Restatement of Torts (2d Ed), sec.8A, pp.16-17.

The jury verdict was supported by the evidence. The jury could have found contributory negligence of the plaintiff or failure to prove defendant West to have been negligent. We cannot say the verdict was against the manifest weight of the evidence. There were sharp conflicts in the evidence which were properly left to and resolved by the jury. The jury has determined these matters and the judgment entered on this count upon its verdict is affirmed. Hitt v. Langel, 93 Ill.App.2d 386, 236 N.E.2d 118 (Fifth Dist.1968); Ault v. Washburn, 72 Ill.App.2d 161, 218 N.E.2d 108 (Third Dist.1966).

JUDGMENT AFFIRMED.

TRAPP, .J., and SIMKINS, J., concur.

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CRAVEN, Presiding Judge

HONORABLE SAMUEL C. SMITH, Judge

HONORABLE LELAND STEVENS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 13th day
of December A. D. 1972, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

| | | |
|----------------------------------|---|---------------|
| People of the State of Illinois, |) | |
| |) | |
| Plaintiff-Appellee |) | Appeal from |
| |) | Circuit Court |
| vs. |) | McLean County |
| |) | |
| Earl W. Harms, |) | |
| |) | |
| Defendant-Appellant |) | |

MR. JUSTICE SMITH delivered the opinion of the court:

The defendant was sentenced in the circuit court of McLean County for a period of one to two years for possession of burglary tools and to a term of one and one half years to four years for attempted burglary. The sentence was imposed after a plea-bargaining agreement between the defendant and the State. He now contends that the trial court should not have sentenced him on both counts of the indictment even though the charges in both counts arose out of the same conduct and that his sentence was disparate with the sentence

of his accomplice whose record or disposition the trial court refused to consider in the defendant's case.

The defendant and one Gary Scott were arrested while walking away from the medical office of a doctor. The rear door of the doctor's office showed pry marks and the defendant had with him a screwdriver, a flashlight and a pair of gloves. The defendant testified that it was originally his codefendant's idea to burglarize the office because he was a user and seller of narcotics. The defendant likewise testified that he bought the screwdriver with him to the office at Scott's insistence, although Scott had been in the doctor's office earlier that day and had unlocked the door. Had the door been unlocked it would seem to us little reason for there to be pry marks on the door.

In any event, it is clear from this record that the screwdriver in question was used in the commission of the burglary and was part and parcel of it. If the defendant's possession and use of the screwdriver was with the purpose of committing the specific burglary for which he is convicted, it may be said to be part and parcel of the same conduct or act. Normally this is not so. Normally the possession of burglary tools does not necessarily cover a specific intent to commit a particular burglary, but only a generalized intent without regard to a particular person

or designated property. Here the screwdriver was taken for use in this particular job and accordingly the conviction for the possession of burglary tools must be reversed. People v. Myles, 111 App.2d , 271 N.E.2d 62; People v. Blahuta, 131 Ill.App.2d 200, 264 N.E.2d 819.

The defendant urges that there is a disparity between his sentence and that of his codefendant Scott. Scott pleaded guilty to attempted burglary and pursuant to a plea-bargaining agreement was sentenced to two years probation with 60 days of it to be served in Vandalia. This was the result of a plea-bargaining agreement whereby the State's attorney agreed to dismiss the two narcotics charges and an indictment charging unlawful possession and sale of narcotics. and Scott was to be a prosecuting witness at the defendant's trial. Scott had no prior convictions. The trial court refused to consider the record in Scott's case in the instant case and treated it as immaterial. When offered the admission of Scott's record was denied. In like manner, the trial court would not permit defense counsel to argue Scott's sentence in its relation to the defendant. In this respect, the trial court misapprehends the applicable law.

It has recently been stated that modern penology teaches us that punishment should fit the offender as well as the crime and a lesser punishment of one codefendant does not per se impeach a greater sentence imposed on another. (People v. Robinson, 3 Ill.App.3d 267, 278 N.E.2d 137; People v. Cox,

119 Ill.App.2d 163, 255 N.E.2d 208; People v. Harden, 111.App.2d , 265 N.E.2d 897.) It is clear that the differences in the criminal records of these two defendants justified the different sentences imposed. Scott had no prior felony convictions. The defendant had been on probation twice before, probation had been revoked, and had served time in the penitentiary. The attempted burglary which is the subject of this appeal was committed shortly after the defendant was released from parole. Scott was 21 years of age and Harms was 32.

We see little point in remanding this case to the trial court for consideration of Scott's record. The trial judge was the sentencing judge in Scott's case. In People v. Jones, 118 Ill.App.2d 189, 254 N.E.2d 843, the appellate court took judicial notice of a companion appeal by a codefendant in order to determine whether the defendant in the case being heard had been subjected to an improper disparate sentence. Where the trial judge is the sentencing judge with multiple defendants or where he is the same judge in separate trials concerning the same crime, it is abundantly apparent that he has or should have knowledge of the facts. In no other way can there be any assurance that disparate sentences will not be imposed on codefendants in trials arising out of the same crime. On the record before us, however, there appears to be little or no justification for imposing similar sentences on each of the defendants or of granting probation to the defendant with some time to be served in Vandalia. Rehabilitation on

probation for him is at least dubious, if not wholly improbable. The disparity in sentence is amply justified. Accordingly, the conviction and the sentence of attempted burglary is affirmed. The conviction and sentence of possession of burglary tools is reversed.

Affirmed in part; reversed in part.

Craven, P.J. and Simkins, J. concur.

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

____HONORABLE HAROLD E. TRAPP,____Presiding Judge

____HONORABLE SAMUEL O. SMITH,____Judge

____HONORABLE LELAND SINKINS,____Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 20th day
of December A. D. 1972, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS
IN THE APPELLATE COURT
FOURTH DISTRICT

| | | |
|----------------------------------|---|---------------|
| PEOPLE OF THE STATE OF ILLINOIS, |) | |
| |) | |
| Plaintiff-Appellee |) | |
| |) | |
| vs |) | Appeal from |
| |) | Circuit Court |
| CHARLES COLEMAN, |) | Macon County |
| |) | |
| Defendant-Appellant |) | |

MR. JUSTICE SIMKINS delivered the opinion of the Court.

The defendant-appellant Charles Coleman entered a plea of guilty to the crime of burglary. The plea was a negotiated plea which was made of record as required by Supreme Court Rule 402(d). Defendant's petition for probation was denied and he was sentenced to an indeterminate term of two to six years.

The Illinois Defender Project has moved to withdraw as defendant's counsel and appended to the motion is a brief in conformity with *Anders v State of California*, 386 U.S. 733, 18 L.Ed.2d 493, 87 S.Ct. 1396. The record shows proof of

service of the motion and of the brief upon the defendant. The motion was continued to enable the defendant to file further or additional suggestions and notice was given to him of this opportunity. None were filed. In the discharge of our responsibility we have examined the record.

The record discloses that the defendant and his counsel had negotiated a plea, with the State's Attorney, the conditions of which were as follows: the defendant would enter a plea of guilty and file a petition for probation which the People would oppose. If the petition be denied the State's Attorney would recommend sentence of two to six years. The trial judge had not participated in the plea negotiations. The defendant confirmed, in response to questioning by the Court, that this accurately represented the terms of the plea negotiations, that he understood that whether or not he was granted probation was a question solely for the Court's determination after hearing, and that he understood that the sentence provisions amounted only to a recommendation. The terms of the negotiated plea were fully complied with by the People.

The record also establishes full and detailed compliance with each and every requirement imposed upon the trial judge by the provisions of Supreme Court Rule 402. He explained the nature of the charge against the defendant, the minimum and maximum of the applicable penalty, including illustrative examples, defendant's right to plead not guilty, that there would be no trial if the plea was entered, explained defendant's right to trial by jury and the burden of proof which devolved

upon the People in the event of trial, defendant's right to confront the witnesses, determined that no threats had been made to defendant to induce the plea, and that no assurances had been given to him other than those contained in the plea negotiations. The factual basis of the plea was established. The sentence imposed was precisely as recommended, and is well within statutory limits.

We agree that no error was committed in the trial court and that this appeal is frivolous and without merit. Accordingly, the petition of the Illinois Defender Project to withdraw as counsel for defendant-appellant is allowed and the judgment of the trial court is affirmed.

Judgment affirmed.

Smith, J. and Trapp, P.J. concur.

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